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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

JOSHUA MICHAELY,

Petitioner,

v.

PATTI MICHAELY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a very important question to be resolved concerning the imposition of discovery sanctions: does the trial court have an affirmative duty to impose sanctions tailored to remedy the specific discovery abuse and to ensure such sanctions are not imposed as a punishment, or does the trial court have plenary power to impose any sanctions it sees fit, no matter how broad and how punishing, and no matter if it strips a litigant of their right to be heard at trial? If plenary power to punish is permissible, then what if any limitations does the due process clause impose on such punishment for discovery abuse?

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Petitioner Joshua Michaely respectfully petitions this Court for a Writ of Certiorari to review the judgment and Opinion of the California Court of Appeal.

OPINIONS BELOW

The opinion of the Court of Appeal is reported at 150 Cal.App.4th 802. The California Supreme Court denied review on July 25, 2007.

JURISDICTION

This Petition has been filed within ninety days of the opinion below; this Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, section 1 specifies:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The published decision in this case effectively gives license to all judges to impose any discovery sanctions they want for any behavior without need or regard to how such sanctions are designed to redress the discovery abuse and without regard to any due process considerations. The decision in this case gives judges the authority to strip a litigant of the right to present evidence or witnesses at trial without restriction, as happened here. As such, this decision is a direct affront and violation of the due process clause of the United States Constitution.

This case presents a very important question to be resolved concerning the imposition of discovery sanctions: does the trial court have an affirmative duty to impose sanctions tailored to remedy the specific discovery abuse and to ensure such sanctions are not imposed as a punishment, or does the trial court have plenary power to impose any sanctions it sees fit, no matter how broad and how punishing, and no matter if it strips a litigant of their right to be heard at trial? If plenary power to punish is permissible, then what, if any, limitations does the due process clause impose on such punishment for discovery abuse?

A. Trial Court Proceedings

Respondent filed for divorce from Petitioner on January 5, 1995. (CT: Vol. 1: 1-6)[1] On that same day, she

1. "CT" refers to the Clerk's Transcript on file in this case, while "Vol." refers to the specific volume of the Clerk's Transcript. In this case, then, this reference refers to Clerk's Transcript, volume 1, pages 1 through 6.

filed an *ex parte* Application without notice to Petitioner asking for numerous orders. (CT: Vol. 1: 11-71) Of the 19 pages of orders granted that morning, the following related directly to Respondent's rights to discover into the business affairs of Petitioner as well as into the holdings of the community estate:

A. Respondent, her attorneys, security guards, locksmiths, photocopy personnel accountants, and other agents were granted immediate access to Petitioner's office, car and residence for the purpose of copying Petitioner's business records; (CT: Vol. 1: 14)

B. Petitioner, Maureen Sowell (Petitioner's long time business partner and assistant) and all of Petitioner's other agents and employees were enjoined and restrained from interfering with Respondent's access to Petitioner's business records; (CT: Vol. 1: 15)

C. Petitioner, Maureen Sowell and all of Petitioner's other agents and employees were to provide Respondent and her agents with all business books and records including check books, cancelled checks, check stubs, check registers, schedules, ledgers, journals, statements, correspondence, computer passwords and car keys to Petitioner's automobile; (CT: Vol. 1: 15-16)

D. Petitioner, Maureen Sowell and all of Petitioner's other agents and employees were to provide immediate access and to unlock all safes, file folders, file cabinets, desks, cupboards, and computers in Petitioner's office; (CT: Vol. 1: 16)

E. Respondent was permitted to photocopy all financial documents found by her during her inspection of Petitioner's office, residence and car; (CT: Vol. 1: 17-18)

F. Petitioner, Maureen Sowell and all of Petitioner's other agents were enjoined and restrained from altering, destroying, withholding, concealing or removing any writings or other objects from Petitioner's office, residence or car; (CT: Vol. 1: 17)

G. Respondent was permitted to station a security guard at Petitioner's office door during the course of their inspection (which lasted more than six days) and to prohibit the entry of Petitioner or his agents from the premises during non-business hours; (CT: Vol. 1: 23)

H. *Code of Civil Procedure* §§2025(b)(2), 2030(b), *2031(b)* and 2033(b) were suspended and Respondent could immediately commence discovery; (CT Vol. 1: 31)

I. The provisions of California *Code of Civil Procedure* §2025(q)(1) were shortened so that Petitioner had to sign any deposition transcript within 10 days of receipt; (CT: Vol. 1: 31)

J. *Code of Civil Procedure* §1985.3's time for notice of the subpoena of personal records was shortened to 10 days notice to Petitioner prior to the hearing and five days notice prior to the date of any deposition of a custodian of records; (CT: Vol. 1: 31)

K. *Code of Civil Procedure* §1987(c)'s time requirement for notice to appear and produce documents at a court hearing was shortened to 15 days prior to the hearing; (CT: Vol. 1: 31-32)

L. *Code of Civil Procedure* §2025's notice of deposition requirement was shortened to 10 days; (CT: Vol. 1: 32)

M. *Code of Civil Procedure* §2031's time for Petitioner to respond in writing to requests for production of documents was shortened to 10 days prior to the taking of Petitioner's deposition. (CT: Vol. 1: 32)

As a result of these orders, Respondent and her agents, including armed off-duty police officers, went to Petitioner's office and spent more than six days photocopying thousands of his documents.

After Respondent's surprise inspection was complete, Petitioner filed an Order to Show Cause to vacate Respondent's *ex parte* orders and to have the thousands of documents taken by Respondent from Petitioner's office, home and car returned to him. (CT: Vol. 1: 76-171) As a result of this application, the court vacated the *ex parte* orders, ordered the records seized by Respondent sealed, and appointed a discovery referee "for all matters". (CT: Vol. 1: 206 – Vol. 2: 210) The court ordered Respondent propound requests for production and that Petitioner and the discovery referee cull through the records and produce only those documents responsive to Respondent's requests for production. (CT: Vol. 2: 208)

A discovery referee was appointed to preside over the examination of the 15 boxes of sealed records taken by Respondent. (CT: Vol. 2: 246) The discovery referee took three days to review the documents with Petitioner's employee, Maureen Sowell, who the referee specified "was very knowledgeable about the documents". (CT: Vol. 2: 246)

The discovery referee separated the documents removed from Petitioner's office by Respondent into four different categories. The first category involved documents bates stamped between 1 and 199,999 which were responsive to the document requests propounded by Respondent. Respondent received copies of these documents. (CT: Vol. 2:247)

The second category involved documents bates stamped between 200,000 and 299,999 which were personal and confidential, including attorney-client

communications and employee income tax K-1 forms. The referee determined Respondent had no right to these documents. (CT: Vol. 2: 247)

The third category involved documents bates stamped above 300,000 and included documents relevant to Respondent's written demand but were in need of redaction or weighing of privacy interests. (CT: Vol. 2: 247)

Petitioner filed his first request for trial setting on March 30, 1995. (CT: Vol. 2: 251)

The original trial date in this matter was set for July 23, 1996. (CT: Vol. 3: 420) That trial date was vacated by the Court and re-set as a 26 day trial for October 28, 1996. (CT: Vol. 6: 1099) Respondent made a motion to vacate that trial date based on the contention she needed more time and money to prepare adequately for trial. (CT: Vol. 6: 1102-1117)

Petitioner filed an opposition to Respondent's motion to vacate the trial date based in part on the fact extraordinary and extensive discovery had already been conducted. (CT: Vol. 7: 1260-1401) Chief among Petitioner's points made to the court was that he already responded to two 50+ page document demands from Respondent (attached as exhibits to his opposition), already had his deposition taken, and already had his office, home and car raided with the result of 15 boxes of documents taken away by Respondent. In short, Petitioner wanted trial to proceed so he could get on with his life and not be subject to the rigors of Respondent's continuing, extensive and expensive discovery. (*Id.*)

Respondent vehemently objected and argued she needed more time to conduct discovery. (CT: Vol. 7: 1402-1420) Respondent's arguments prevailed and the court vacated the October 28, 1996 trial date and extended the discovery cut-off date to 30 days before the next date set for trial. (CT: Vol. 7: 1421-1423)

On October 16, 1996 the judge presiding over the Michaely's divorce entered a Statement Of Decision and Statement of Facts relating to his order suspending the "one deposition rule" under the terms of *Code of Civil Procedure* §2025(t) and Respondent's need to "depose Respondent regarding the movement of monies, to update information on other issues and to complete her investigation in order to properly prepare for trial." (CT: Vol. 10:1905-1906)

On October 16, 1996 Respondent filed a motion to compel further responses to her second demand for production of documents propounded to Petitioner. (CT: Vol. 8: 1519 – Vol. 10: 1904) Said motion was denied by the court.

Respondent also brought a motion to compel further answers to special interrogatories propounded to Petitioner, which was then referred to the discovery referee. (CT: Vol. 13: 2495-2498) The referee determined (and the court adopted as its order) that Petitioner need not provide further answers to many of the 300 special interrogatories, including numbers 1, 2, 3, 5, 6, 13, 14, 15, 16 ,17, 18, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32 and 34. (CT: Vol. 16: 3134-3143) Of interrogatories 36 through 300, Petitioner was ordered to provide further responses to 35-50, 52-63, 68, 69, 71, 73-85, 87-167, 170-270 and 274

through 300. (CT Vol. 16: 3134-3143) Petitioner provided Respondent with these further, very detailed responses in compliance with the orders of the court. (CT Vol. 18: 3640-3679)

Trial was set once again, this time for August 6, 1998. (CT Vol. 16: 3131) This meant Respondent had until July 7, 1998 to finish her discovery per the terms of the court's prior order extending the cut-off date. (CT Vol. 7: 1421-1423),

Once again Respondent filed a motion to vacate the trial date based upon her proven argument that she needed more time. (CT Vol. 19: 3688 – Vol. 19: 3708) Petitioner opposed Respondent's request, stating in part Respondent had adequate time for discovery, had in fact conducted extensive discovery, and that Respondent was the root cause of the fact trial would not be going forward because she filed for bankruptcy and there was an automatic stay in effect. (CT Vol. 19: 3730-3779)

All sides agreed economic issues could not proceed in the state court divorce action until a relief from the automatic stay in Respondent's bankruptcy case was obtained. The gist of the contest between Respondent and Petitioner for the purposes of Respondent's second motion to vacate the trial date revolved around yet another extension of the discovery cut-off date. After three and half years of discovery, Respondent wanted more. (CT Vol. 18: 3688-3699) Petitioner argued discovery should be finished. (CT Vol. 19: 3740-3743)

At the hearing on Respondent's motion, counsel for Respondent argued Respondent's bankruptcy made

them lose "ten months in connection with the discovery." (RT [6/17/'98] C-5:24-25)[2]

The trial court agreed with Petitioner and refused to extend the discovery cu -off date or to vacate the trial date. (CT Vol. 19: 3799-3801) The court simply did not accept Respondent's argument: "I can only repeat, the fact that your client might go into the bankruptcy should have been obvious way back." (RT [6/17/'98] C-5:26-28) "Counsel, I asked you. I said, 'Figure it's going to be done the hard way.' You picked a date a year away. I never set trials that far off. I did it because of your statement." (RT [6/17/'98] C-6:2-5) "As far as discovery, I think I've stretched it out long enough. I don't want to extend it pass the current date."

As placed in evidence in Petitioner's divorce, the trustee in Respondent's bankruptcy determined after "diligent inquiry" the Michaely's marital estate (the entirety of which was at issue by way of Respondent's bankruptcy) was a "No Asset Case". (CT Vol. 25: 4966)

Respondent never took Petitioner's deposition between the October 16, 1996 suspension of the "one deposition rule" and discovery being halted altogether on July 7, 1998 (more than 20 months).

Respondent did, however, take the deposition of Maureen Sowell ("Sowell"). From the outset of this case Respondent acknowledged Sowell's importance. In her own declaration in support of her *ex parte* orders

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2. "RT" refers to the Reporter's Transcript of court proceedings on file and part of the record of appeal in this case.

obtained on the day she filed for divorce Respondent wrote: "Maureen Sowell has access to financial information, bank records and other business records located at my husband's office. Ms. Sowell is also authorized to sign on various bank accounts held in the names of these entities." (CT Vol. 1: 59-60) In fact, even a cursory review of the orders issued by the judge that day shows Sowell's name appears dozens of times. (CT Vol. 1: 14-32) Respondent believed Sowell was a crucial witness in making her case.

On July 9, 1998 Respondent brought an *ex parte* motion to compel Sowell's deposition. (RT: Vol. 19: 3803-3892) Respondent asserted Sowell was a "critical and essential witness" intimately involved with Petitioner's day to day business as a notary public, corporate secretary, corporate officer and limited and general partner of many of Petitioner's business entities. (CT: Vol. 19: 3803 – 3892)

In opposition to this *ex parte* request, Petitioner pointed out to the court the discovery cut-off date it recently refused to extend had, in fact, come and gone. (RT Vol. 19: 3893-3896) The court shortened time for hearing and ultimately ruled Sowell had to give her deposition despite the fact the extended discovery cut-off date was passed.

Sowell testified about bank accounts, properties, business entities, foreclosures, business practices and every other thing Respondent wanted to know about. Sowell testified about Petitioner's dates of acquisitions, dates of sales, transfers of assets, partners and partnerships, corporations and corporate officers, assets and all manner of Petitioner's business activities. (CT Vol. 32: 6547 – Vol. 37:7585)

The Michaely divorce was then transferred to another department. As a result, Respondent decided to bring another motion to reopen discovery for the purpose of taking Petitioner's deposition. (CT Vol. 24: 4780-4891) Respondent based this motion in part on the allegation "she has not had the opportunity to depose Respondent in any detail regarding their assets, Petitioner's claims regarding misappropriation and reimbursement issues, and support." (CT Vol. 24: 4792: lns. 23-26)

Petitioner opposed Respondent's efforts to reopen discovery to depose him again. (CT Vol. 24: 4912 – 25: 5015) He pointed out to the new judge that the prior judge already refused to extend discovery after having already extended it for more than a year. He argued the trial in this matter should have already taken place (and that the prior judge said it should have already taken place) but for the fact Respondent filed personal bankruptcy. He argued Respondent had all of his documents from the day the case was filed and had taken Sowell's deposition which provided Respondent with a wealth of detailed information. (*Id.*)

Most importantly, though, Petitioner argued Respondent had sat on her rights to further depose Petitioner after the suspension of the "one deposition rule" and after the trial judge extended discovery past the original cut-off date. (CT: Vol. 24: 4922-4926) Respondent "had the opportunity" but did not take Petitioner's deposition between June 1996 and extended discovery cut-off date of July 1998.

Petitioner's opposition also detailed how Respondent's attorneys, as third party creditors in Respondent's bankruptcy action (i.e. they were owed

millions of dollars of fees for their work for Respondent over the past years representing her in her divorce against Petitioner) themselves conducted discovery into the very issues they were now asking the court to decide. For example, Respondent's motion to re-open asked to permit her to take the deposition of a third party while her own attorneys had already been granted such an order to depose that same third party as part of Respondent's own personal bankruptcy. (Vol. 25: 4964)

Respondent once again prevailed and the court ordered Petitioner's second deposition taken despite the fact the discovery cut-off date had come and gone not once, but twice over the period of three and a half years. (CT Vol. 25: 5059; CT Vol. 26: 5290-5294) The judge also ordered various judicial officers to act as referees during Petitioner's second deposition. (CT Vol. 25: 5061-5062; CT Vol. 26: 5290-5294)

Petitioner, per the court's order and at Respondent's expense, flew from his home in Israel and returned to Los Angeles for his second deposition. During the course of that deposition he answered "I don't recall" or "I don't remember" to about one half of the questions posed. He substantively answered the rest of those posed over the several days of his continuous testimony.

As a result of Petitioner's performance at his second deposition, on September 1, 1999 Respondent brought a motion for discovery sanctions establishing, *inter alia*, that the estate had a value in excess of $21,000,000, that Petitioner breached his fiduciary duty to Respondent regarding dozens of real estate assets, and that Petitioner could pay and Respondent needed to be

paid at least $19,000 per month for spousal support. (CT Vol. 26: 5306 – Vol. 28: 5572) Petitioner opposed these requests. (CT Vol. 29: 5845-5975)

The matter was referred by the trial judge (having replaced the trial judge who made the order to permit Petitioner's second deposition) to yet another discovery referee, who also happened to be a judge who had previously presided on various issues in this case but had since retired. This referee was present at Petitioner's second deposition.

As this referee's report indicates, the matter was heard by her on February 15, 2000. (CT Vol. 31: 6295) Her report, however, was not signed by her until October 2, 2000 (CT Vol. 31: 6337) and not filed with the court until November 9, 2000 (CT Vol. 31: 6295)

Some 19 months later, on June 20, 2002, the trial judge signed the order adopting all of the discovery referees recommendations (literally hundreds of pages) without a single change. (Vol. 50: 9808)

Three years later, that same judge entered the Final Judgment on Reserved issues on August 17, 2005, incorporating all of the discovery sanctions. (CT: Vol. 50: 10272-10278)

During the course of the underlying litigation, the court ordered Respondent have exclusive occupancy of the community residence. (CT Vol. 2: 258 lns. 20-22)

Having been notified by Petitioner of the proposed sale of community property, Respondent obtained orders

from the court enjoining that sale and permitting her own real estate appraiser to have access to the property. (RT Vol. 2: 276) In her moving papers, Respondent demonstrated an intimate understanding of the partnership, including who its partners were, what its partnership agreement stated and what its value was. (RT Vol. 2: 289 lns. 8-25) As an alternative to the sale, Respondent sought the appointment of a receiver. (RT Vol. 2: 293)

On March 12, 1996 Petitioner and Respondent entered into a Stipulation relating to the sale and inspection of 12 community real estate assets which, in part, gave Respondent's real estate appraiser access to each property. (CT: Vol. 3: 423-424)

On September 4, 1996 Respondent was given exclusive management and control of the net proceeds from the sale of another community asset known as "Miranda" in the amount of $28,000. (RT: Vol. 7:1425-1472)

On March 29, 1996 Petitioner filed a motion to modify his spousal support. Among the evidence contained therein was an accounting showing Petitioner paid Respondent the sum total of $224,037.11 of support since the inception of their divorce in January 1995. (CT Vol. 3: 451-452; Vol. 4: 791) Petitioner's request to modify was denied by the court. (CT Vol. 6: 1100-1101)

On November 26, 1996 Respondent was granted a charging order against Petitioner's 80% community property interest in a partnership to satisfy unpaid spousal support. (CT Vol. 12: 2394-2399) That order

further gave Respondent "immediate management and control" of other community property, including her to receive the net rental income derived from that property. (CT Vol. 12: 2395 lns. 18-24) That order also stated Respondent was to receive all of the net proceeds from the sale of that property and that the second trust deed of that property was not to be paid. (CT Vol. 12: 2397 lns. 8-23)

On September 25, 1997 Respondent's motion to appoint a receiver over other community real property was entered by the court. (CT Vol. 20: 3919-3929)

On September 28, 1999 Petitioner's renewed motion to modify support was heard. The court determined and found Petitioner had a gross income of $5,000 per month and that Respondent had no income at all. (CT Vol. 31: 6218 lns. 8-10) As a result, the court reduced Petitioner's spousal support obligation from $7,500 per month to $1,700 per month. (*Id.* at lns. 11-16)

B. The Court of Appeal's Decision

The Court of Appeal's decision in this case, certified for publication, does not contextualize why or how the draconian sanctions imposed were warranted. In short, the Court of Appeal makes no effort to explain how the sanctions imposed redress the alleged dereliction of duty by Petitioner to respond to discovery in light of and considering the extensive and complex history of all discovery in this case.

The result of the sanctions in this case was that Respondent was prevented from presenting any

evidence of any kind or nature at the trial of this matter. He was not permitted to testify himself. He was not permitted to present expert witnesses. He was not permitted to present third party witness. He was not permitted to present documentary evidence.

The Court of Appeal simply determined there was "no abuse of discretion" when the trial court ordered Petitioner could present no evidence at trial contradicting the issue sanction that he had the ability to pay more than $19,000 per month for spousal support, that the community estate had a value of $21,000,000, or that Petitioner defrauded Respondent.

In doing so, the Court of Appeal ignored the fact Respondent obtained copious amounts of discovery over more than three years and numerous vacated trial dates. The Court of Appeal ignored the fact Respondent sought and was granted a motion to take Petitioner's second deposition and then failed to do so for 20 months before the trial court finally refused to grant her third request to continue the discovery cut off date (i.e. that Respondent was not vigilant and sat on her rights). The Court of Appeal ignored the fact Respondent had discovery extended in her case for more than 16 months.

Most importantly, the Court of Appeal ignored the reality of the facts of this case. While the sanctions imposed specified Petitioner had actually absconded with various community assets, the facts (as detailed herein above) reveal the record is replete with example after example showing those same assets actually were managed and sold by the Respondent and or receivers appointed at her request.

The sanctions imposed in this case are so severe they could only be reasonably imposed if Respondent had been unable to obtain any discovery of any kind as a direct result of Petitioner's failure to abide by discovery requests and orders. The Court of Appeal makes no effort to explain how the actual sanctions imposed are warranted by Petitioner answering "I don't recall" to about one half of the questions posed to him at his second deposition in a case where discovery had already been conducted for almost four years, where the discovery cut-off date had been extended numerous times, and where no court order regarding discovery had ever been violated.

In light of existing law, the Court of Appeal's unwillingness to say anything other than the sanctions were not an abuse of discretion creates a monumental exception to a well established rule that sanctions should be tailored to redress the alleged abuse. Using the rationale of *Michaely*, though, any judge or lawyer could simply argue the sanctions requested are not an abuse of discretion without ever reaching the analysis of how the sanctions requested are warranted considering the specific circumstances of each case. As such, the holding of this case flies in the face of the due process clause of the Constitution.

Michaely is in direct conflict with decisions annunciating a very different analysis and necessitating a very different outcome.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEAL'S DECISION IN THIS CASE GIVES TRIAL JUDGES PLENARY POWER TO STRIP A LITIGANT OF THE RIGHT TO TRIAL WITHOUT REGARD TO DUE PROCESS

This case presents and important and recurring question: what is the due process standard relating to the imposition of discovery sanctions at the trial court level? The court below annunciated a broad and amorphous "arbitrary, capricious and whimsical" standard when other cases, most recently including a case from the same Second Appellate District of the California Court of Appeal, require a much stricter analysis.

"Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party." (*Karlsson v. Ford Motor Company* (2006) 140 Cal.App.4th 1202, 1214, 45 Cal.Rptr.3d 265)

Karlsson was a Second Appellate District case and constituted another in a long line of cases standing for the same thing. (*See also see also* (*Vallbona v. Springer* (1996) 43 Cal.App4th 1525, 1544-1549, 51 Cal.Rptr.2d 311, *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396, *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1399, 115 Cal.Rptr.2d 137)

"Sanctions should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to the denied discovery." (*Deyo v. Kolbourne* (1978) 84 Cal.App.3d 771, 793)

In *Karlsson*, defendant Ford Motor Company was found to have been in wanton and intentional violation of numerous discovery orders.

In *Michaely* there is no dispute: Petitioner did not violate any discovery order, not even one. The only thing alleged is that the discovery referee did not believe him when he answered "I don't know" to about one half of the questions posed at his second deposition.

In *Karlsson*, the court determined defendant Ford Motor Company was the sole repository of the information sought.

Here, the record itself supports the undisputed fact Petitioner was not the only source of the information sought. The deposition of Maureen Sowell, for example, was lodged with the trial court by Petitioner in opposition to the trial court adopting the requested sanctions and are part of the record on appeal.

The questions asked of Ms. Sowell and Petitioner were identical on a question by question basis. Further, Ms. Sowell answered their questions so that by the time Petitioner was asked them at his second deposition Respondent already had answers. When Petitioner sat for his second deposition Respondent already had been told by Ms. Sowell when the properties were bought,

when they were lost, how much they cost and who the investors were, for example.

Unlike the Court of Appeal in this case, the Court of Appeal in *Karlsson* looked at the entirety of discovery in that case. Instead of effectively entering a verdict for the Plaintiff and depriving Defendant of the opportunity to present evidence at trial, the *Karlsson* Court tailored sanctions specifically to redress the information the Plaintiff could not have gotten from anyone but Ford and which Ford refused to produce.

Ford was not barred from presenting evidence at trial about all issues, as in this case. The reason: because the court in Ford looked at the specific alleged abuse and tailored the sanction to redress it. The Court in this case failed to do this or even acknowledge that doing so was a legal requirement. The court in this case also failed to make any ruling or undertake any analysis regarding whether or not Petitioner was the sole source of the information they sought. Sowell's deposition clearly showed he was not.

The Court of Appeal in this case failed to consider the long and tortured history of discovery in this case. They failed to recognize that unlike Ford, Petitioner had never once refused to obey a court order relating to discovery. The court violated Petitioner's right to due process in so doing.

The Court of Appeal also refused to address or consider the very important fact Respondent sought and was granted the right to take Petitioner's second deposition and then failed to do so. The Court of Appeal

refused to address or consider the fact the trial court extended discovery for Respondent numerous times and then, finally, cut it off.

Respondent was given the opportunity to conduct substantial discovery in this case. She was given the means to do so through the vast sums of cash paid to her by Petitioner during this case. In light of these facts the sanctions imposed are nothing less than an illegal punishment against Petitioner and, as such, violate his due process rights.

Given the extensive discovery effectuated by Respondent in this case (having started with a raid on Petitioner's offices on the day she filed), and given the voluminous and "doomsday" nature of the sanctions imposed, it is an egregious miscarriage of justice to simply state the sanctions were not an abuse of discretion.

How do these sanctions imposed fit in with the history of discovery in this case? *Karlsson* and *Vallbona* and *Do It Urself Moving & Storage* and *Maldonado* and *Deyo* require this question be answered. By failing to even ask this question, the Court in this case effectively repudiates *Karlsson* and *Vallbona* and *Do It Urself Moving & Storage* and *Maldonado* and *Deyo* and sets up a separate standard relating to the imposition of discovery sanctions in direct opposition to the holdings of these long established cases. Taking away a litigant's rights to present evidence at trial must be considered the last and most extreme sanction any court can impose for discovery sanctions. The wanton and carefree approach to doing so evident in this case seems to say

due process plays no role. The history of discovery in this case was not considered. The diligence of the Respondent was not measured. The reality of the disposition of the numerous properties (i.e. that they were controlled and sold by Respondent, often pursuant to court order) was not accounted for prior to imposing the very fanciful fiction of these sanctions.

Answering "I don't remember" to some questions at a second deposition, especially in light of previous and extensive discovery, should not be grounds for a judge's imposition of sanctions in effect gagging the mouth and binding the hands of a litigant at trial. The right to be heard is fundamental to the very concept of due process.

The ruling in this case gives license to every judge down the line to do the same without considering the context of the discovery abuse, without considering the sources of alternative information, without considering the diligence of the moving party, without considering the factual realities of the case. And without considering these things before a judge takes away a litigant's right to be heard at trial is to fail to consider due process itself.

It takes very little imagination to envision future litigants asking for issue and evidentiary sanctions based on the allegation that the opposition was simply incredible at their deposition like the offending party in *Michaely*. And that is exactly what this case will represent to future litigants should it go unchecked by this Court. After all, there is nothing in the record of this case showing Petitioner actually lied when he answered "I don't recall" to about half of the questions posed to him at his second deposition.

The sanctions imposed in this case are so all-encompassing and severe as to make one believe Respondent was not provided with any discovery of any kind or nature. Yet the only thing these sanctions are based upon is the fact Petitioner answered "I don't recall" to about half of the questions posed to him at his second deposition after years and years of successful discovery undertaken by Respondent.

The sanctions are so absurd and so out of whack with reality that they actually state that numerous properties controlled and sold by Respondent were "in fact" magically managed and controlled by Petitioner. The sanctions state Petitioner breached his fiduciary duty relating to these properties and that he absconded with them when Respondent, was in fact, paid the proceeds from their sale.

Respondent was the one ordered by the court to have control and sole use of the community residence (CT Vol. 2: 258 lns. 20-22), the Van Nuys Star Partners office building (CT Vol. 2: 276), the Cornell property (CT Vol. 24: 4804) and Miranda house (CT: Vol. 12: 2397 lns. 8-23). Respondent actually received hundreds of thousands of dollars from her control of these properties yet the sanctions state Petitioner actually stole them.

Such incongruous and ridiculous sanctions (i.e. when the sanctions create a fiction contradicted by the facts of the case) are the kinds of results this Court can expect if trial courts and the Court of Appeal are not required to abide by the standards announced by *Karlsson* and *Vallbona* and *Do It Urself Moving & Storage* and

Maldonado and *Deyo*. In short, courts will be able to simply make up anything they want without rhyme or reason and in abject contravention of actual facts, as in this case.

The fact these sanctions were imposed as a result of the court simply not believing Petitioner's testimony is doubly offensive to all concepts of due process. Most every lawsuit includes two sides where parties give diametrically opposed testimony relating to the same issue. As such, this case stands for the simple proposition that any judge could take away a litigant's right to present evidence and testimony at trial so long as that judge basis such sanctions on a finding he does not believe a litigant's testimony given at his deposition. Again, such a result is an insult to due process and must be reversed.

These kinds of results could never have happened if the trial court or the Court of Appeal actually bothered to look at the discovery and the facts in this case, as prior published opinions cited herein require.

Petitioner completed all discovery asked of him and abided by each and every discovery order prior to discovery finally being cut-off. Respondent had more than three and half years between January 1995 and July 1998 to conduct discovery, and she did so. The order to reopen discovery was only for the limited purpose of permitting Respondent the opportunity to examine Petitioner regarding issues relating to the time *after* July of 1998 when discovery was finally cut-off.

However, the sanctions imposed go back in time to 1995 covering a period when Petitioner sat for his first

deposition, Respondent raided his offices and Petitioner answered copious amount of written discovery. During that time Respondent also sought discovery from third parties, e.g. Maureen Sowell.

But the Court of Appeal never explains why the sanctions imposed in this case should go back to 1995. What did Petitioner do to deserve those sanctions? At most (if one accepts the contention that answering "I don't recall" can be the basis for such severe sanctions) Petitioner should have been refused permission to offer his personal testimony relating to anything after July 1998, when discovery was finally cut-off .

In light of the tremendous amount of discovery in this case by Respondent, sanctions going back to 1995 are incomprehensible and totally unsupported by even the most exaggerated read of what due process might mean in this context. The problem with the Court of Appeal's decision in this case is that they do not take into account any discovery facts. There is no analysis how *these* sanctions in light of the history of discovery in *this* case were justified to redress *this* alleged abuse.

When you sanction one party by stating they owe the other $21,000,000 for breaching their fiduciary duty, that they have the ability to pay $19,000 per month for support (which had previously been reduced to $1,700 per month after a contested hearing based on actual evidence and not out of this world sanctions), and that they cannot present any contrary evidence at trial, the least the Court should have done was explain how these sanctions were tailored to redress Petitioner answering "I don't recall" at his second deposition after all of the

discovery and right to discovery in this case. Anything less is simply unfair and contrary to every known concept of due process.

These sanctions are a punishment. These sanctions are not tailored to redress Petitioner's performance at his second deposition. These sanctions would only be warranted if Respondent had suffered a total deprivation of all discovery of every kind and could not have located the information from any other source but Petitioner. Instead, she had total access to all of Petitioner's business records from the very day the case was filed. The opinion upholding the propriety of these sanctions simply disregards all due process considerations as articulated by numerous, prior cases.

The Court of Appeal's "abuse of discretion" analysis in this case sounds good and is an easy out. However, it resulted in a complete miscarriage of justice.

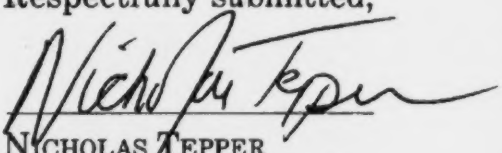
As importantly, though, is the fact that *Michaely* is grounds for every judge and every litigant to seek wildly outlandish and undeserved discovery sanctions. *Michaely* stands for the proposition that the history of discovery in a case need not be considered. *Michaely* stands for the proposition that sanctions can be imposed as a punishment and need not be tailored to redress the wrong.

Michaely stands in direct opposition to *Karlsson* and *Vallbona* and *Do It Urself Moving & Storage* and *Maldonado* and *Deyo* and, as such, should be reversed.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted,

Respectfully submitted,



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APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE FILED APRIL 16, 2007

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FIVE

B186705

PATTI MICHAELY,

Respondent,

v.

JOSHUA MICHAELY,

Appellant.

April 16, 2007

ARMSTRONG, J.

Joshua Michaely ("Husband") appeals from the judgment entered in the dissolution proceeding filed by his former wife, Patti Michaely ("Wife"). We affirm.

Appendix A

Factual and Procedural Summary[1]

This dissolution case has an extraordinarily long history. The petition was filed on January 5, 1995, after the parties had been married for 24 years. The judgment of dissolution was in August of 1998, but the judgment which is the subject of this appeal, the Further Judgment on Reserved Issues, was not entered until August of 2005. The Reserved Issues were financial issues, and the issues on appeal concern sanctions, in the form of factual findings, which were imposed on Husband as the result of his conduct during discovery, in particular his conduct at a 1999 deposition.

These are the relevant facts:

Wife first took Husband's deposition in March of 1995. In May of 1996, she noticed another deposition. Husband objected, but the court (the case was then assigned to Judge Denner), found that Wife had "demonstrated good cause for the suspension of Code of Civil Procedure section 2025(t), the 'one deposition rule,' . . . in that the issues and facts involved . . . are complicated," and because "[Husband] moves monies from entity to entity and the information which [Wife] obtained from [Husband's] prior depositions does not

1. Wife's request that we take judicial notice of the opinions of the United States District Court, District of Nevada, and the United States Court of Appeals for the Ninth Circuit, in Husband's bankruptcy, is granted. We also grant her request to substitute exhibit copies of specified trial exhibits, in place of originals.

provide [Wife] with current information . . . In addition, the parties have lived an extravagant lifestyle, little or no income has been 'reported' on the parties' individual income tax returns or the income tax returns of [Husband] for the last several years. Therefore, [Wife] should be given an opportunity to complete discovery regarding the means by which [Husband] has been able sustain the marital standard of living without reporting substantial income."

The deposition never took place, delayed by discovery disputes and Wife's bankruptcy, which was filed in February 1998. The discovery disputes concerned Wife's August 1996 interrogatories, which Husband did not fully answer until March 1998, after Wife brought a motion to compel (November 1996), which resulted in a report (August 1997) from retired Judge Saeta, then the discovery referee, and a November 1997 court order adopting Judge Saeta's recommendation that Husband be compelled to further respond to the vast majority of Wife's 300 interrogatories and finding, inter alia, that "the volume of transactions and documents make this a complex tracing of assets case."

In March of 1999, after Wife obtained relief from the bankruptcy stay, she moved for an order re-opening discovery. Trial was then set for September 1, 1999. Judge Lachs (the case was assigned to any number of judges over the years) granted the motion. Wife was ordered to pay Husband's air fare from Israel, where he then lived, and a $200 a day per diem. The court also ruled that a discovery referee would preside over the deposition.

Appendix A

As Husband repeatedly points out, Wife's earlier request for additional discovery was denied: In June 1998 Wife moved for an order to vacate the trial date and to extend discovery. Judge Denner stayed trial of economic issues until relief from the stay was granted in Wife's bankruptcy, and denied the request to extend the discovery cut-off.

The deposition which Judge Lachs ordered took place in June 1999. Retired Judge Goldin presided as referee. In September, Wife moved for sanctions based on Husband's pre-deposition document production and his performance at the deposition. Hearing on the motion was before Judge Goldin. It did not take place until February 2000, apparently delayed by Husband's bankruptcy, which was filed in September 1999. (On Wife's motion, relief from the stay was granted in January 2000.)

Judge Goldin's report was signed on October 2, 2000 and filed with the court in November 9 of that year. She found that at the deposition, Husband engaged in intentional, pervasive, and egregious evasiveness, was willfully untruthful, and gave inconsistent and contradictory testimony. His conduct at the deposition was the equivalent of refusing to sit for the deposition, in violation of court order. Husband failed to produce documents in response to the request for production, did not produce documents he claimed to have produced, claimed that he could not identify documents which he did produce, and intentionally produced voluminous documentation which was not responsive. He had in the

past failed to comply with other discovery. His intentionally evasive and obstreperous conduct deprived Wife of meaningful discovery.

Judge Goldin recommended that various facts be established as true: Husband had management and control over the community estate during the marriage and after the separation; he owed a fiduciary duty to Wife in the management and control of community assets,[2] which he breached; and he willfully and maliciously engaged in acts to deprive Wife of her share of the community estate. Judge Goldin recommended that it be established as true that the estate had a value of $21 million on the date of separation, and additionally made a separate finding to that effect, based on the evidence.

Judge Goldin also recommended that it be established as true that Wife needed at least $19,000 per month in support and that Husband could pay that amount, and that Husband be precluded from opposing many of Wife's claims, specifically the claims that he misappropriated a long list of community properties, including real properties, businesses, and insurance policies.

In November 2001, the bankruptcy court hearing Husband's bankruptcy found that his debts to Wife and her lawyers were not dischargeable. The bankruptcy

2. Of course, this is not a factual finding, but a statement of law. (Fam.Code, §§ 721, subd. (b), 1100, subd. (e); *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 992, 80 Cal.Rptr.2d 699.)

court's order recites that that court reviewed Judge Goldin's report, and while it did not give evidentiary effect to the report, it did give such support to the evidence cited therein. The bankruptcy court noted that it had read Husband's deposition transcript and that of his former associate Maureen Sowell, and found "extensive and persuasive support" for Judge Goldin's findings and recommendations.

In June 2002, the court (by now, Judge Sandoz) adopted Judge Goldin's report as its own order, finding that the order was necessary to level the playing field and prevent Wife from being prejudiced by Husband's willful and egregious misuse of discovery, and that the imposition of lesser sanctions would not be a sufficient remedy. The court found: "[Husband's] consistent evasion, coupled with [his] responses which were blatant untruths and not credible, amounted to an egregious abuse of the discovery process."

At trial, Husband took the position that sanctions precluded him from introducing evidence on the "vast majority" of the issues. Wife introduced evidence on income which should be imputed to Husband from date of separation, her need for support, and fees.

In the Further Judgment on Reserved Issues, the court found that Husband breached his fiduciary duty to Wife while he had control of community assets, willfully and maliciously engaged in acts to deprive her of her share of the community estate, and perpetrated fraud on her. Wife was awarded $21 million, plus interest, plus support of $35,360 per month, plus attorney fees.

Appendix A

Discussion

1. *The 1999 order re-opening discovery*

Husband's first argument is that Judge Lachs's 1999 order that he sit for another deposition was an abuse of discretion. Husband contends, inter alia, that under Code of Civil Procedure section 2024.020, he had a right to have discovery end 30 days before trial, that Wife failed to meet and confer, and that in any event Wife had all the information she needed. Husband does not explain why any abuse of discretion on Judge Lachs's part could lead to reversal now. We do not see that it could. Husband's conduct at the deposition and throughout discovery caused the sanctions. The deposition order itself caused him no harm. We thus need not and do not reach the substance of Husband's arguments. (Cal. Const., art. VI, § 13.)

2. *Judge Goldin's report*

Husband next argues that the report was procedurally defective in two ways. First, he argues that the order appointing the referee was invalid under Code of Civil Procedure section 640, which in 1999 provided that the referee must "reside in the county in which the action or proceeding is triable. . . ." [3] Husband points out

3. Code of Civil Procedure section 640 provided that "A reference may be ordered to the person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable. . .."

that Judge Goldin's office was in Los Osos, in San Luis Obispo County, and argues that it is unreasonable to conclude that she lived in Los Angeles County, and that the trial court should have investigated the location of her residence. He further argues that he did not learn that Judge Goldin's office was in Los Osos until she began sending bills and other communications to the parties, citing in support his counsel's statements at oral argument on the sanctions.

His second procedural ground is based on Code of Civil Procedure section 643, which (then and now) provides that "[u]nless otherwise directed by the court, the referees or commissioner must report their statement of decision in writing within 20 days after the hearing. . . ." Husband argues that because Judge Goldin's report was not sent to the court within 20 days, it was invalid and should not have been considered.

Husband did not raise either ground until his opposition to Wife's motion for sanctions, and we agree with Wife that he has waived these objections. Contrary to his argument, Husband was informed from the outset that Judge Goldin's office was in Los Osos. The minute order proposing her (along with two other candidates) as discovery referee lists a post office box in Los Osos as her address. Any violation of the 20 day rule would have been apparent when the 20 days elapsed. Husband did nothing to timely cure either of these alleged defects, and cannot seek redress now.

What is more, Husband cites no prejudice which he suffered due to Judge Goldin's (presumed) residence outside Los Angeles County. He similarly cites no prejudice from the time delay, except to suggest that the report was too detailed and too thorough, hardly a judicial error cognizable on appeal.[4] He does argue that "harm is not the standard," seeming to suggest that violation of the 20 day rule is per se reversible. He is wrong. "Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred." (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833, 16 Cal.Rptr.2d 38.) Harm *is* the standard.

3. *The sanctions*

Husband next addresses the merits, arguing that the sanctions order was an abuse of discretion. He argues that discovery sanctions can only be imposed for failure to comply with a court order, or when a pattern of discovery abuse leads to a loss of evidence. He then argues that sanctions were imposed in this case only on the finding that his performance at the deposition was the equivalent of refusing to obey the court order that

4. We entirely reject Husband's unsupported contention that Judge Goldin either engaged in improper ex parte communications with Wife's counsel or "abdicated" her responsibilities by simply signing the report prepared by Wife's counsel, without exercising any oversight or discretion. We similarly reject the unsupported suggestion that Judge Goldin timed the report so that it would influence the judge in Husband's bankruptcy proceeding.

he sit for his deposition, and that the finding was in error. He argues that "he came, he sat, he answered," boasting that he provided substantive answers to half the questions asked. Ignoring the fact that Judge Goldin presided over the deposition and was in an excellent position to make credibility findings, he also argues that there is no evidence to support the implied finding that when he answered "I don't know," he did so untruthfully. Without specific citation to the record, Husband also argues that there was no history of repeated discovery abuse.

A trial court has broad powers to enforce its discovery orders, and may impose sanctions that are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery sought. (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396.) "Misuse of the discovery process includes failing to respond or submit to authorized discovery, providing evasive discovery responses, disobeying a court order to provide discovery, unsuccessfully making or opposing discovery motions without substantial justification, and failing to meet and confer in good faith to resolve a discovery dispute when required by statute to do so." (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1214, 45 Cal.Rptr.3d 265.) "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action." (*Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904, 190 Cal.Rptr. 593.)

We see no abuse of discretion here. In his brief, Husband recites some of the questions he did answer, leading off with two questions about a girlfriend and two questions about Maureen Sowell's signature. Judge Goldin's report puts those questions and answers in context: Husband, who admitted that Sowell acted as a notary for him, testified that he could not recognize her signature, or, indeed, his own. He knew that she continued to work for him after he moved to Israel, but not who was paying her. He testified that he did not know that his girlfriend (with whom he had lived) had purchased community real property (which he had allowed to go into foreclosure) at a foreclosure sale, or where she got the money to do so, although he did testify that they had discussed the possibility that she would buy the property.

Husband also recites his substantive, yes-or-no answers to questions about his ownership of many entities. Judge Goldin's report quotes his "I don't recall," or "I have no idea," answers to questions about his ownership interest in many more. He did not know when numerous properties went into foreclosure or were sold, whether his entities were partners in specified partnerships, or the assets which other of his entities owned. Husband argues that he testified about his ownership of an entity called JM Real Estate and the properties it owned. Judge Goldin quoted more of his testimony on that entity: he did not recall whether he had caused the entity to be formed, and did not know who was on its board or who its shareholders were or whether it had filed tax returns. He testified that he had

gotten a salary from that entity, he did not remember when that was.

These are but a few examples, but they are telling. The referee's report is a long and illuminating document, and its extensive quotes from the deposition more than support the finding that Husband egregiously abused the discovery process, both in his document production and in his answers to questions.

Husband also contends that the sanctions were an abuse of discretion because Wife had all the information she needed from other sources, including the business records he produced, and that she could have gone to third parties to obtain the information she needed. When his record references are examined, Husband is relying on the fact that Wife obtained documents from his office at the inception of this action, in 1995, on the fact that he answered special interrogatories in 1998, and on a March 1995 letter from his counsel to her counsel listing twenty properties (including the family home and its contents) and several debts, putting a value on each, and suggesting a property distribution.

Husband also cites Sowell's deposition, which Wife took in late 1998 or early 1999 after bringing two motions to compel, the first to obtain the deposition, and the second after Sowell (represented by Husband's attorney) asserted rights under the Fifth Amendment to the United States Constitution and refused to answer any questions.

To state the facts is to refute them. The 1995 information was simply too old, given Husband's plethora of assets and the fact that, as Judge Denner found, Husband moved money from entity to entity, and, as Judge Saeta found, this was a complicated case involving tracing of assets. The 1998 interrogatories were prefatory to the deposition. There is no showing that the answers could replace the deposition, and no reason to assume so. We say the same about Sowell's deposition. Husband points out that in 1995, Wife declared that Sowell had access to the business and financial records at Husband's office and was authorized to sign on various bank accounts held by some of Husband's business entities, and that in her motions to compel, Wife alleged that Sowell was a critical witness. That does not mean that she could replace Husband as a witness.

In this portion of his brief, Husband also cites the facts that his support obligation was reduced $21,000 per month to $1,700 per month, based on evidence that his income was $5,000. This took place in September of 1999, and we cannot see that the finding is relevant to any issue on appeal.

Finally in this regard, Husband contends that the court erred by not considering the history of all discovery, arguing more specifically that the court erred in finding that Sowell's deposition was irrelevant and not to be considered in determining sanctions. The order Husband cites is the *referee's* order denying Husband's request that she consider Sowell's deposition testimony. Judge Goldin listed four grounds for her ruling: (1) the

testimony is irrelevant to the motion for sanctions; (2) the Code of Civil Procedure did not authorize Husband to submit the deposition to the court on a sanctions motion (citing Code of Civil Procedure section 2025, subd. (u), since repealed); (3) the fact that Sowell sat for her deposition did not relieve Husband from his obligation to comply with discovery; (4) Husband failed to timely submit the testimony.

Husband does not cite to anything which would show that he asked the trial court to consider the testimony. The trial court thus did not err.

4. *Collateral estoppel*

When it considered Wife's motion to adopt Judge Goldin's report, the trial court found that Husband was "collaterally estopped from relitigating the issues litigated and resolved by the Bankruptcy Court," in his bankruptcy. Husband argues that "The court erred by adopting the [referee's] report based on [Wife's] collateral estoppel argument." Substantively, he argues that his due process rights were violated because Wife did not raise the issue until her reply papers in the proceedings on the motion to adopt the referee's report; and that under established law, collateral estoppel did not apply.

We need not reach the merits of Husband's arguments. Husband does not tell us which issues were "litigated and resolved by the Bankruptcy Court," so that we cannot tell what effect the collateral estoppel finding

had. Moreover, even if, as he asserts, the court adopted Judge Goldin's report based on the bankruptcy court's findings, it was at most an alternate ground. A ruling on collateral estoppel could make no difference here.

5. *Other issues*

At the end of Husband's brief, he seems to argue that the Final Judgment must be reversed because the court ordered support in excess of that recommended by Judge Goldin, and ordered him to pay Wife's attorney fees, even though Judge Goldin did not recommend that order. Husband offers no authority which would establish that the court was limited by the report. What is worse, he ignores the fact that Wife introduced evidence at the trial.

Disposition

The judgment is affirmed. Wife to recover costs on appeal.

ARMSTRONG, J.

We concur

TURNER, P.J.

KRIEGLER, J.

APPENDIX B — REPORT, FINDINGS AND RECOMMENDATION OF REFEREE; AND ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES DATED JUNE 20, 2002

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CASE NO. BD 206 726 (Transferred to Dept. 60)

In Re Marriage of:

Petitioner: PATTI MICHAELY

and

Respondent: JOSHUA MICHAELY

REPORT, FINDINGS AND RECOMMENDATION OF REFEREE; AND ORDER

DATE:	02/15/00
TIME:	10:00 a.m.
DISCOVERY REFEREE:	MARTHA GOLDIN, JUDGE RETIRED
DEPT:	60
JUDGE:	JOHN SANDOZ, JUDGE
TRIAL DATE:	N/A

Martha Goldin, a retired Judge of the Superior Court, was appointed by the Honorable Stephan Lachs

as a discovery referee pursuant to the Order filed with the Court on May 26, 1999. Petitioner's Motion for Sanctions came on for hearing on February 15, 2000 before the Honorable Martha Goldin, Retired Judge, at the Law Offices of Freid and Goldsman, A Professional Law Corporation located at 2029 Century Park East, Suite 860, Los Angeles, California. Petitioner appeared through her attorneys, FREID AND GOLDSMAN, by GARY J. COHEN and MARCI R. LEVINE; Respondent appeared through his attorney of record, NICHOLAS TEPPER.

The Discovery Referee, having received evidence, and the matter having been duly argued at a lengthy in-person hearing at which time each party had a full and fair opportunity to litigate the issues arising from the subject motion, having considered the objections and motions to strike submitted by both parties, and good cause appearing, the Discovery Referee makes the following REPORT, FINDINGS AND RECOMMENDATIONS:

Each party's written objections and motions to strike portions of the other party's pleadings have been considered and ruled on. With respect to each party's written objections and motions to strike, the Court makes the following orders and findings:

A. The Court strikes those portions of each declaration which are argumentative and irrelevant. The Court has not considered those portions of the pleadings which have been stricken in connection with its rulings.

B. The Court denies Respondent's request to strike those portions of the Declaration of Marci R. Levine which reference portions of Respondent's deposition testimony on the grounds of the Best Evidence Rule, as certified copies of Respondent's deposition transcripts were lodged with the Court and the Court reviewed and considered Respondent's deposition testimony.

C. The Court denies Respondent's request to strike Petitioner's Memorandum of Points and Authorities, as Memorandum of Points and Authorities simply constitute written argument and are not considered facts or evidence.

D. Respondent's motion to strike pages 11 through 16 of Petitioner's Reply Declaration is denied. Respondent failed to timely object to the number of pages of Petitioner's Reply Declaration. Notwithstanding that Respondent failed to timely object to the length of Petitioner's Reply Declaration, the Court considered Respondent's objection and denies said objection.

E. Respondent's request that the Court review and consider the deposition transcripts of Maureen Sowell is denied on the following grounds: (1) the deposition testimony of Maureen Sowell is irrelevant to Petitioner's Motion for Sanctions; (2) Code of Civil Procedure section 2025(u) does not authorize Respondent to submit the deposition transcripts of Maureen Sowell to the Court for its consideration for any purpose whatsoever in connection with Petitioner's Motion for Sanctions; (3) there is no statutory authority which authorizes Respondent to submit the deposition transcripts of a third party to the Court,

other than those purposes which are specifically authorized by Code of Civil Procedure section 2025(u); (4) the fact that Maureen Sowell sat for her deposition does not relieve Respondent from his obligation to comply with discovery; and (5) Respondent failed to timely submit the deposition transcripts to the Court.

REPORT AND FINDINGS:

I. **RESPONDENT INTENTIONALLY GAVE EVASIVE RESPONSES:** Respondent intentionally gave evasive responses at his June 1999 deposition. Respondent's evasiveness was pervasive and egregious. Respondent repeatedly provided Petitioner with inadequate responses to the questions posed by Petitioner's counsel. Respondent's conduct at his deposition rose to a glaringly obtrusive and evasive level so as to intentionally undermine Petitioner's discovery efforts and render his appearance at the deposition the equivalent of Respondent refusing to sit for his deposition as directed by the Court Order filed with the Court on May 26, 1999. Respondent's consistent evasion, coupled with Respondent's responses which were blatant untruths and not credible, amounted to an egregious abuse of the discovery process. Respondent deliberately adopted obstructive tactics at his June 1999 deposition in order to deny Petitioner the opportunity to engage in meaningful discovery, thereby precluding Petitioner from having the opportunity to adequately prepare for and present evidence at a trial on reserved issues and hearings relating to the issue of pendente lite spousal support. For example, Respondent consistently testified

that he could not identify his own signature on documents produced in response to Petitioner's First Document Demand (which the former Discovery Referee, Philip Saeta, Retired Judge, caused to be Bate-stamped). The documents which were bate stamped at Judge Saeta's direction were located in Respondent's office in 1995. The following are but a few additional examples of the responses given by Respondent which demonstrate that he was intentionally evasive at his deposition:

1. **Respondent could not recall what businesses he had managed and/or operated in recent years, other than J.M. Real Estate:**

> Q Other than JM Real Estate, what other business did you manage or operate, whether you owned it or not, during the period September 1, 1996 to May 1, 1997?
>
> A **I don't recall.**

(Vol. 4, 534:7-11)

2. **Respondent also repeatedly testified that he could not identify the signature of Maureen Sowell, his secretary of approximately fifteen years, who also had served as a notary for Respondent and his entities.**

> Q Take a look at the notary. Is that your employee Maureen Sowell's notary, name and signature?

A I don't know for sure.

Q Is the name Maureen Sowell? Does it say Maureen Sowell?

A Yes, it does.

Q Now, how many times would you say since she has worked for you until you left for Israel that you have seen her signature on a document? Would you say more than 500 times?

A No.

Q You had her sign — act as a notary on many documents over the years when she worked for you, didn't you?

A Yes.

Q And you saw her signature on those documents, didn't you?

A **I don't remember paying attention to it.**

Q So you don't recognize her signature any more than you recognize your signature; is that correct?

A That's correct.

(Vol. 5, 749:7-750-3)

3. Respondent gave evasive testimony concerning community real property that he allowed to be lost to foreclosure, only to have his live-in girlfriend, Galina Kubrak, purchase the property at foreclosure.

Q So in connection with the Erwin Street property, do you know when that property was lost to foreclosure?

A No.

Q Do you know who acquired that property at foreclosure?

A No.

Q I'm going to ask you to take a minute and think about the question again and tell me if you know who acquired that property at foreclosure.

MR. TEPPER: Objection. Asked and answered and argumentative.

THE COURT: Sustained.

MR. TEPPER: Did you understand that if it's sustained you don't have to answer?

THE WITNESS: No, I didn't. If I miss it please explain to me.

THE COURT: Not to worry. If he starts to answer, I'll remind him he doesn't have to.

MR. TEPPER: Okay. It doesn't happen that often.

BY MR. FREID:

Q Do you know a Galina Kubrak?

A Yes.

Q K-u-b-r-a-k.

A Yes.

Q How do you know her? What is your relationship to her?

A Friendly.

Q Was she a girlfriend of yours at one time?

A Yes.

Q Did you live together at one time?

A Yes.

Q Are you aware of the fact that she is the record owner of the Erwin property that we're now talking about?

A I don't believe so.

Q Do you know whether she at any time acquired ownership of that property at or after the foreclosure, whether she still owns it now or not?

A **I don't understand the question.**

(Vol. 4, 568:1-569:16)

Q Mr. Michaely, prior to the foreclosure sale, did you ask Ms. Kubrak to buy the property?

A **I don't understand the question.**

Q Prior to the foreclosure sale taking place, did you ask her to buy the property, regardless of who it was for, did you ask her to buy the property?

A No.

Q Did you suggest, prior to the foreclosure sale, that Ms. Kubrak buy the property?

A We discussed it.

Q What did you tell her, if anything, as to why you thought she should buy the property?

MR. TEPPER: Objection. Mischaracterizes his testimony.

THE COURT: Overruled.

BY MR. FREID:

Q Answer the question.

A **I didn't understand.**

MR. FREID: Read it back to him, please.

(Record read.)

THE WITNESS: **I don't recall.**

BY MR. FREID:

Q Did you tell her that you believe the property was worth more than what was owed against it?

A **Not that I recall.**

Q Did you cosign or guarantee any obligations regarding her acquisition of that property?

A No.

Q Do you know anyone who did, if at all?

A No.

(Vol. 4, 577:5-579:9)

Additional examples of Respondent's evasive and incredulous responses are set forth in the Appendix to this Report, Findings and Recommendation of Referee; And [Proposed] Order (hereinafter, the "Appendix") in Paragraph I and Paragraph II. (See Paragraph I of the Appendix, commencing at page 1, line 4 through page 90, line 14; see Paragraph II of the Appendix, commencing at page 90, line 15 through page 173, line 15).

II. **RESPONDENT WAS WILLFULLY UNTRUTHFUL AT HIS DEPOSITION:** Respondent was willfully untruthful when he responded "I do not know", "I do not remember", "I do not recall" in response to the questions posed by Petitioner's counsel. Throughout the deposition, Respondent repeatedly responded "I do not know", "I do not remember", "Don't know", "I have no idea". The following are but a few examples of Respondent's responses which lacked credibility which were rampant throughout the deposition:

1. **Respondent testified that he did not remember the document which his attorney admitted into evidence in his presence at a contempt hearing which reflected a $2.7 million receivable due Respondent. Respondent also testified that he could not remember**

the underlying transaction which resulted in his acquiring the $2.7 million receivable.

BY MR. FREID:

Q At the top, the document says "Joshua Michaely Note Receivable From Davister Corporation." It has several columns. One column has a "Date." Another column says "Description." Another column says "Principal Payments, Interest Payments, Advances, Principal Balance, 10 Percent Interest, Accrued Interest, Balance Due." Do you see that?

A Yes.

Q Mr. Michaely, **do you recall my examining you in any court proceeding regarding this document**?

A No.

Q Mr. Michaely, this document reflects — with reference to Davister, the first line which is March 8 has advances of 2-million-700-and-some-odd-thousand dollars. Do you see that item?

A Did you say the first line?

Q Yes. It says — the first line is March 8th. The second column for "Description" says "Payment." The column says "Advances," 2-million-732-thousand-and-some-odd dollars. Do you see that?

A No.

Q You don't see it?

A It's not clear to me, but . . .

Q Mr. Michaely, **what payment, if any, did you make to Davister that brought about this note receivable from Davister in the amount of 2-million-732-thousand-and-some-odd dollars**?

A **I don't recall.**

Q Mr. Michaely, the date is March 8, 1995. That's the date on the document. That is approximately six months following the date of separation. What business transaction, if any, did you engage in that brought about such a payment to Davister by you?

A **I don't remember.**

Q With reference to this promissory note, this note receivable from Davister to you, has any part of the note been repaid other than

the amount that you said Davister — strike that. I'm not going to say "other than the amount." You said that they were doing it as a benevolent gesture, so I'm assuming that was not against the obligation owed to you. So I'm going to ask you: As of April 30, 1996, the unpaid balance according to Exhibit 33 was 2-million-300 and some-odd-thousand dollars. $2,392,204.17. Has any part of that amount been paid to you?

A I don't recall.

Q Do you remember any business transaction at all that you had with Davister in or about March of 1995 that brought about this obligation from Davister to you?

A No.

(Vol. 5, 858:19-861:7)

2. Similarly not credible was Respondent's testimony that he could not remember the names of any businesses in which he had an ownership interest as of 1996.

Q With reference to businesses that you had an ownership interest in in 1996, can you remember the name of any of those businesses?

A No.

Q Can you remember the name of any business, whether it was a corporation or partnership, that you were an owner in on September 7, 1994?

A No.

(Vol. 5, 809:3-10)

3. Also not credible was Respondent's testimony that he did not know who was paying the salary of his long-time secretary, Maureen Sowell, when she was rendering services for Respondent when he was residing in Israel.

Q Are you aware of the fact that Maureen Sowell was still doing work for you and entities which you had an interest in after you left for Israel? Were you aware of that?

A Yes.

Q Who was paying her?

A I didn't pay her.

Q Who was paying her?

A I don't know.

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Q You have no idea?

A Not at this moment.

Q Do you know what she was getting paid a month?

A I don't remember.

Q What was she getting paid a month when you left for Israel, just before you left?

A I don't remember.

Q Which entity that you had an ownership interest in was paying her salary or compensation two months before you left for Israel?

A I don't remember.

(Vol. 4, 695:11-696:6)

Additional examples of the responses which Respondent provided at his deposition which rendered his testimony completely unreliable and not credible are set forth in Paragraph I and Paragraph II of the Appendix. (See Paragraph I of the Appendix, commencing at page 1, line 4 through page 90, line 14; see Paragraph II of the Appendix, commencing at page 90, line 15 through page 173, line 15).

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III. **RESPONDENT GAVE INCONSISTENT AND CONTRADICTORY TESTIMONY**: Respondent's inconsistent and contradictory testimony further demonstrated that he failed to provide Petitioner with credible responses, thereby impeding Petitioner's ability to engage in meaningful discovery. Respondent first testified that he did not use his alias, Josh Moore, for several years. It was only after Petitioner's counsel contradicted Respondent with documents which Petitioner had obtained which reflected that Respondent had indeed utilized his alias in recent years that Respondent altered his testimony. The following are a few examples of the contradictory testimony Respondent gave at his deposition which exacerbated the evasive nature of Respondent's testimony:

1. **Respondent first testified that he did not use his alias, Josh Moore, for several years. It was only after Petitioner's counsel contradicted Respondent with documents which Petitioner had obtained which reflected that Respondent had indeed utilized his alias in recent years that Respondent altered his testimony.**

> Q Is the name Josh Moore a name you have used from time to time?
>
> A **Well, in the past many, many years ago only.**

(Vol. 4, 586:2-5)

The next folder that came out of box 12 is a folder this is entitled or identified as "10747 Wilshire Boulevard, No. 706 Mortgage Information."

Q Mr. Michaely, did you take title to this condominium individually or in the name of one of the businesses, whether a corporation or partnership, that you were a part owner in?

A **I don't recall.**

Q Let me show you a document dated October 7, 1996. It appears to be the stationery of Coast Federal Bank. It comes out of the folder that I just mentioned. It says "Subject: Coast loan 339181-0." The letter is addressed to Josh Moore, 16260 Ventura Boulevard, No. 500, Encino, California. Take a look at it if you would, please. Do you see the document?

A Yes.

Q Mr. Michaely, does that refresh your memory at all that you have in fact used the name Josh Moore more recently than 10 years ago?

A No.

Q Mr. Michaely, did you use the name Josh Moore in 1997 in any business dealings?

MR. TEPPER: Objection. Vague. Does he mean did he recognize that when someone else wrote him a letter in the name Josh Moore, does that constitute his using the name Josh Moore?

MR. FREID: Yes.

THE WITNESS: If somebody wrote a letter to Josh Moore —

BY MR. FREID:

Q Josh Moore was you, wasn't it? In October of 1996, weren't you Josh Moore in addition to Josh Michaely and their names?

MR. TEPPER: Objection. Vague. "Weren't you Josh Moore?" What do you mean?

BY MR. FREID:

Q Did you use the name or recognize or respond to the name of Josh Moore when somebody addressed something to you in that name?

A Josh Moore is my American name.

MR. FREID: I've marked this as Exhibit 18 for identification.

(Petitioner's Exhibit 18 marked.)

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BY MR. FREID:

Q Mr. Michaely, did you ever have your name changed from some non-American name to Josh Moore legally in any court of law?

A No.

Q When did you first start — strike that. When you say Josh Moore is your American name, what do you mean by that statement? Explain it.

A My Hebrew name is Yehoshua Michaeli.

Q You can spell that for the reporter later or help her out. But go ahead. That's your Hebrew name.

A Correct. Some people call me Joshua Michaely, some people call me Josh Michaely, and I still feel that it's not an American name. Josh Moore is more American name in my opinion.

Q How about David Michaely; is that more of an American name than Josh Michaely? That's a name you use, too, isn't it?

MR. TEPPER: Objection. There's a question pending.

MR. FREID: That is the question.

MR. TEPPER: You just asked two questions in a row.

MR. FREID: I'll withdraw and rephrase it.

THE COURT: Rephrase it.

BY MR. FREID:

Q You also used the name David Michaely. Do you consider that also to be your American name?

A No.

Q You used the name Josh Michaely. Did you consider that to be your American name that you used?

A Possibly.

Q You used the name David Leone. Did you consider that to be your American name?

A No.

MR. FREID: I've marked Exhibit 18.

(Vol. 5, 759:20-763:4)

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I'm going to show you a document that I have marked as 20 for identification. It is a Deed of Trust With Assignment of Rents showing a recordation date of November 4, 1992. The document is dated November 1, 1991. The trustor is Josh Moore. The beneficiary of the trust is Central Roofing, Inc. The amount of the encumbrance being secured says in the document is $120,000. **There is a signature line that appears to be that of Josh Moore with a notary by Maureen Sowell.** I'm going to ask you to take a look at this document.

(Petitioner's Exhibit 20 marked.)

BY MR. FREID:

Q And by the way, so there's no misunderstanding, the document specifically says 10747 Wilshire Boulevard, Unit 706. Is that the condominium unit that you owned?

A I believe so.

Q Take a look at the document, please.

A I reviewed it briefly.

Q Do you see the signature that says "Josh Moore"?

A Yes.

Q Is that your signature?

A I have no idea, but it looks like it.

(Vol. 5, 766:3-767:3)

2. **Respondent made inconsistent claims regarding his ownership interest in various assets, including his interest in J.M. Real Estate.** Contrary to Respondent's claim, both in deposition testimony and his Amended Schedule of Assets and Debts, Respondent swore that he had an interest in J.M. Real Estate Holdings, Inc. Specifically, in Respondent's Amended Schedule of Assets and Debts, dated March 3, 1995, he lists on Attachment 15 "JM Real Estate Holdings, Inc. (50% interest)." Respondent's Amended Schedule of Assets and Debts was attached to Petitioner's Motion as Exhibit "M". Credible evidence was presented to the Discovery Referee that Respondent testified at his March 10, 1995 deposition that he had an interest in J.M. Real Estate. (Vol. 2, 258:3-25 and page 259, lines 1-7.) When asked what J.M. Holdings was, Respondent stated that it was "a corporation that I [Respondent] own.

The deposition testimony which Respondent provided at his March 1995 deposition relating to J.M. Real Estate directly contradicted the testimony he gave at his June 1999 deposition regarding his ownership interest in J.M. Real Estate. Respondent testified the he did not have an ownership interest in J.M. Real Estate

at his June 1999 deposition and then inadvertently testified that he gave J.M. Real Estate away for practically nothing. The following represents some of the testimony Respondent gave at his June 1999 deposition with respect to J.M. Real Estate:

> Q What do you mean? Do you know whether or not he had an ownership interest in J.M. Real Estate Holdings, Inc., ever?
>
> A To the best of my recollection, and it's not that good, I gave him J.M. Real Estate practically for nothing. And the owners of J.M. have given him whatever they had for nothing, practically for nothing, because it's worth — it's worth minus.
>
> Q And when did you give it to him for almost nothing?
>
> A While I was the president, I gave it to him. Whatever interest I had in there, whatever titles I had in there, I gave him.
>
> Q Didn't you sign declarations or testify in the litigation between Raffie Rosenfeld and J.M. Real Estate, Inc., that you sold your interest in J.M. Real Estate to Guy Ravid for a nominal amount?
>
> A **I don't recall.**

(Vol. 8, 1312:3-20)

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Additional examples of the contradictory responses provided by Respondent are set forth in Paragraph III of the Appendix. (See Paragraph III of the Appendix, commencing at page 173, line 16 through page 185, line 17.)

IV. **RESPONDENT FAILED TO PRODUCE DOCUMENTS IN RESPONSE TO THE AMENDED NOTICE**: Respondent failed to produce documents at the June 1999 deposition proceedings in response to Petitioner's Amended Notice of Taking Deposition and Request for Production of Documents ("AMENDED NOTICE") served upon him. The following are a few examples of the types of documentation which Respondent failed to produce in response to the AMENDED NOTICE:

> **Q Do you know where any of the records relating to the foreclosure of the Indiana property are located since you didn't produce them here today** — since you didn't produce them in connection with your deposition proceedings?
>
> **A No.**
>
> Q What documents, if any, were being prepared on behalf of the Indiana property between the time of the acquisition to the time it was lost to foreclosure?
>
> **A I don't know.**

(Vol. 8, 1265:7-17)

Q Did you bring any records with you — produce any records in connection with this deposition regarding your living expenses after September 1, 1996?

A I believe so.

Q What records did you bring?

A **I don't recall.**

Q Do you know what type of records you brought with you for this deposition session? By that I mean this week pertaining to your living expenses? Describe them for us.

A **I don't remember.**

(Vol. 4, 638:25-639:10)

Additional examples are set forth in Paragraph IV of the Appendix. (See Paragraph IV of the Appendix, commencing at page 185, line 18 through page 188, line 2.)

V. RESPONDENT DID NOT PRODUCE DOCUMENTS WHICH HE CLAIMED HE PRODUCED AND CLAIMED THAT HE COULD NOT IDENTIFY DOCUMENTS WHICH HE DID PRODUCE: At Respondent's June 1999 deposition, Respondent claimed that he produced the documents in response to the AMENDED NOTICE in the manner in which he

maintained said records and repeatedly claimed that he had produced documents in response to the AMENDED NOTICE. Notwithstanding Respondent's testimony, when challenged, Respondent was repeatedly unable to locate records which he claimed he produced in response to the AMENDED NOTICE when Petitioner's counsel requested him to do so. Respondent did not recognize documents and was unable to identify documents he allegedly produced in response to various categories. The following are a few examples of some of the documents which Respondent claimed he had produced in response to the AMENDED NOTICE which he had in fact failed to produce in response to the AMENDED NOTICE:

1. Respondent claimed that he produced documents relating to (a) the exchange of the San Felipe property for the Indiana property, (b) the transaction which resulted in Mr. Michaely and/or his entities relinquishing their interests in the property located at 995 West 25th Street, and (c) documents pertaining to the relinquishment of the community interest in the Indiana property after the 1031 exchange. Respondent failed to produce any documents relating to the exchange of the San Felipe property for the Indiana property, any documents relating to the interest in the Indiana property after the exchange, or any documents relating to the foreclosure on the property located at 995 West 25th Street, in Signal Hill, California.

> MS. LEVINE: I would love for you to be able to find the records, because I would really be interested in finding those records.

MR. TEPPER: So let's do it.

MS. LEVINE: As soon as I'm finished with these series of questions, I will ask that you do that, because there may be additional records which I do not believe were produced that I would like to have if he did so.

MR. TEPPER: Okay.

MS. LEVINE: Your Honor, I don't think that it's necessary for me to respond to the rest of that.

THE COURT: Mr. Tepper, let me just remind you one thing. It is your client's position. I'm not attributing to you your client's position, although it appears to be your position as well, that the documents that have been referenced to repeatedly here this morning and at other times were produced and, again, today his position is these documents were produced. Now, if it's your position that they may not have been produced, that they weren't produced, then fine. Then there are no documents here. But otherwise, your client and you will go through the records and you will either come up with the records or you will have to state on the record that you yourselves could not find none.

(Vol. 8, 1256:3-1257:3)

MS. LEVINE: Why don't we take a break. I think we're at a place for you to stop and look for the documents. Just so that it's clear, **the documents are the documents relating to the exchange of the San Felipe property for the Indiana property and also the documents that relate to the transaction which resulted in Mr. Michaely and/or his entities relinquishing their interests in the property located at 995 West 25th Street.**

MR. TEPPER: What is that? Is there a common name for that?

MS. LEVINE: I believe that's the Signal Hill property.

Q Is that correct, Mr. Michaely?

A I don't recall.

THE COURT: Ms. Levine, you made the notes, and I don't care which things you're asking for, but I thought originally you asked for **documents pertaining to relinquishment of interest in the Indiana property after the 1031 exchange.**

MS. LEVINE: Right. **And also I want the exchange documents. And then when we got to the 995 West 25th Street property, I said I'd also like those when he pulls the**

others. If there is a file that is with the documents relating to the West 25th Street that deals with the foreclosure, I would like to have that. Otherwise, I don't want you to waste your time doing it. I just want those documents specifically.

MR. TEPPER: Okay.

MS. LEVINE: Can we note that it is five to 11:00.

(Recess.)

MS. LEVINE: It is now about 11:25. And, Mr. Michaely and Mr. Tepper, have you gone through all the boxes to locate those records?

Q Mr. Michaely, have you gone through all those boxes?

A I went through half, and my attorney went through half.

Q Were you able to locate any of the documentation relating to the exchange of the San Felipe property for the Indiana property?

A I didn't.

MS. LEVINE: **Mr. Tepper, did you locate any?**

MR. TEPPER: **No.**

BY MS. LEVINE:

Q Mr. Michaely, did you locate any of the foreclosure documentation relating to the Indiana property?

MR. TEPPER: Yes or no.

THE WITNESS: **No.**

BY MS. LEVINE:

Q I also asked for documentation relating to the foreclosure on the property located in Signal Hill, California. Were you able to locate any records related to that foreclosure?

A Not in the time I spent.

Q Do you think if you spent more time you would be able to locate those records?

A I have no idea.

Q Did you go through all the boxes with your counsel?

A Very rapidly.

Q If you think you need more time, indicate it. I want to make clear that those records weren't produced.

A I don't need more time.

Q So those records were not produced; is that correct?

MR. TEPPER: At this deposition?

MS. LEVINE: At this deposition. He said he produced at the deposition proceedings.

MR. TEPPER: **Then he said he didn't find any more records.**

MS. LEVINE: I want Mr. Michaely to indicate whether or not he produced it.

Q Now, after going through the records were you able to locate any of those records?

A No.

Q What records, if any, were you able to locate regarding the San Felipe property?

A Foreclosure notice and statement of modification of the note and lien.

Q Can I see that document, please. **This document was from 1991. Are there any documents regarding the disposition of this property that was produced from the time**

period of September 7th 1994 to the present time regarding the foreclosure or the exchange?

A This is the only document that I found at this time.

(Vol. 8, 1251:17-1261:12)

Q Where are all the documents relating to the transaction which resulted in you or your entities relinquishing their interest in that property located?

A I believe it was all produced to your office.

Q When?

A I don't recall.

Q Prior to the deposition, is that what you're saying?

A And during the deposition.

Q Can you identify one document that you believe was produced during these deposition proceedings that related to that transaction?

A No.

(Vol. 8, 1236:22-1237:10)

2. Respondent repeatedly failed to identify and/or explain the documents he produced in response to the AMENDED NOTICE.

MS. LEVINE: I'm going to hand it to the witness and ask if he can tell me what property that title insurance relates to.

THE WITNESS: Do you want me to guess or would you like me to verify?

MS. LEVINE: **I would like you to look at the document and tell me whether from the document you can tell.**

THE WITNESS: **No.**

(Vol. 2, 223:10-18.)

I'm going to hand this page to the witness and ask if he can tell me, if he knows, what it is or what it relates to.

(Off-the-record discussion between the witness and his counsel.)

THE WITNESS: **No.**

(Vol. 2, 230:3-8.)

Q Mr. Michaely, I'm handing you a document entitled AIB deposit batch and ask

you if you can please tell me what that document is or relates to. There were some checks attached to the front, what appears to have been a computer printout document.

A **I have no idea.**

Q Mr. Michaely, this is a document from box number ten and I'm going to ask you if you can identify this handwritten note which appears to be signed by you and ask what it is.

A What is the question?

Q What is this document related to?

A **I have no idea.**

Q What category did you produce it in response to in connection with the notice of taking deposition?

A I believe it has something to do with Van Nuys Star Partners.

Q Okay. Do you know when that document was prepared?

A It says January 26.

Q What year?

A It doesn't say.

Q Can you read the — can you please read the writing? **Is this your writing**?

A **I don't know**.

Q It's signed by — purportedly signed by you.

A I have no idea. It looks like my handwriting, but I cannot testify to that.

(Vol. 3, 436:13-437:17)

MS. LEVINE: The next file folder is entitled 8800 Kester, number 124, ownership information. There's a mortgage statement from Midland Mortgage Company dated April 14th, 1997 addressed to a Joshua Michaely regarding loan number 0014474523 Property 8800

Q I'm going to hand the document to Mr. Michaely and ask him if that represents a statement from the trust deed holder on the property — the subject property?

A **I have no idea.**

Q Have you ever seen this document before today?

A **Not that I can recall.**

Q When you were sorting through the documentation in order to produce them in response to our request today, did you look through these files before producing them?

A Yes, very fast.

(Vol. 3, 448:13-449:6.)

Additional examples are set forth in Paragraph V of the Appendix. (See Paragraph V of the Appendix, commencing at page 188, line 3 through page 190, line 24.)

VI. **RESPONDENT FAILED TO PRODUCE THE DOCUMENTATION AT THE COMMENCEMENT OF THE DEPOSITION**: Respondent failed to produce the documentation responsive to the AMENDED NOTICE at the commencement of his deposition in accordance with the April 7, 1999 Court Order. Respondent produced documents, on a piecemeal basis, for three and a half days of his deposition.

VII. **DUE TO RESPONDENT'S INTENTIONALLY EVASIVE AND OBSTREPEROUS CONDUCT, RESPONDENT DEPRIVED PETITIONER OF ENGAGING IN MEANINGFUL DISCOVERY**: By failing to produce documentation responsive to Petitioner AMENDED NOTICE at his deposition in June 1999 and refusing to provide Petitioner with meaningful responses, Respondent deprived Petitioner of information relevant to Petitioner's claims to property,

spousal support, attorneys' fees and costs, and her claims for reimbursement and misappropriation. Respondent continued to provide evasive responses concerning assets he managed and controlled when Petitioner's counsel provided him with bate-stamped documents which Petitioner had obtained from Respondent in 1995. In addition to those examples set forth in Paragraphs I through VI herein, the following are a few additional examples of the types of responses which Respondent gave at his deposition which evidence his refusal to provide Petitioner with information relevant to the financial issues, including the disposition, character, and management of assets, and Respondent's business transactions:

1. Respondent gave evasive and incredulous responses concerning the formation and disposition of American City Fund, Inc., one of the community estate's principal entities formed by Respondent during marriage, as well as evasive responses concerning the disposition of the assets owned by American City Fund, Inc.

Q With respect to American City Fund, Inc., that entity was a corporation, correct?

A I believe so.

Q In what state was American City Fund, Inc., incorporated?

A I have no idea.

Q You were the sole shareholder of American City Fund, Inc., correct?

A **I don't remember.**

Q You and/or one of your entities owned all of the stock of American City Fund; is that correct?

A **I don't remember.**

(Discussion between counsel and witness.)

BY MS. LEVINE:

Q Isn't American City Fund, Inc., one of the corporations you commonly used to acquire assets?

A **I don't remember.**

Q Did you cause tax returns to be filed on behalf of American City Fund, Inc., since 1990?

A I believe so.

Q What accountant or accountants prepared tax returns on behalf of American City Fund, Inc.?

A **I don't remember.**

Q I'm going to invite your attention, Mr. Michaely, to a document that was, I believe, may have been previously marked. **But, in any event, I'm going to invite your attention to the page that is Bates stamped 000108. It was taken from your office during the document inspection in 1995.** It's on the letterhead of Regal American, Inc. It's entitled "Financial Interests, American City Fund, Inc.," by the title. **It has a footnote, one of which says "American City Fund, Inc. is wholly owned by Joshua Michaely."**

MR. TEPPER: Are you marking this one?

MS. LEVINE: I don't know yet.

Q I'm going to ask if that refreshes your recollection if you or one of your entities owned American City Fund, Inc.

MR. TEPPER: You just want him to look at this one page?

MS. LEVINE: Yes.

MR. TEPPER: There you go, Josh.

THE WITNESS: **No.**

MS. LEVINE: I'm going to mark that page only. Can we go off the record.

(Recess.)

(Deposition Exhibit 44 marked.)

MS. LEVINE: Could you read back the last question?

(Record read.)

MS. LEVINE: Let me rephrase the question.

Q Does the document that I showed you prior to the break refresh your recollection that you or one of your entities wholly owned American City Fund, Inc.?

A No.

Q Did you cause that entity to be formed, American City Fund, Inc.?

A I don't recall.

Q Were you the president of American City Fund, Inc., Mr. Michaely?

A Yes.

Q What real estate has American City Fund, Inc., owned since January 1, 1992?

A I don't recall.

Q Did it have an ownership interest in any of the following properties since that date?

MR. TEPPER: What's the date? January 1, '92?

MS. LEVINE: To the present time.

Q 17734 Miranda?

A I have no idea.

Q 1915 Apex?

A I have no idea.

Q 200 Palmdale Boulevard, Palmdale, California?

A To the best of my memory?

Q To the best of your memory, yes.

A To the best of my memory at this point, yes.

Q 19684 National Trails Highway, Oro Grande, California?

A I don't remember.

Q 7500 San Felipe, Houston, Texas?

A **Don't remember.**

Q 23591 El Toro and 24551 Raymond, Lake Forest?

A **I don't remember.**

Q 6201 Bordeaux Road, Dallas, Texas?

A **Don't remember.**

Q 4235 — 2167 Northeast Loop, No. 410, San Antonio, Texas?

A **Don't remember.**

Q 13225 Gault Street?

A **Don't remember.**

Q 8800 Kester, No. 124, in Panorama City?

A **Don't remember.**

Q 1322 San Pablo Avenue in San Pablo, California?

A **Don't remember.**

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Q 2002 North Gateway Boulevard, Fresno, California?

A **Don't remember.**

Q 29348 Roadside Drive in Agoura Hills?

A I believe so.

Q 700 West Bennett Street in Compton, California?

A I believe so.

Q 18333 Hatteras Street, No. 52, Tarzana?

A **I don't remember.**

Q 241 South Mariposa in Los Angeles, California?

A **Don't remember.**

Q 22225 Erwin Street in Woodland Hills?

A **Don't remember.**

(Vol. 6, 932:18-937:4)

Q Are there any other assets other than the ones you previously testified to, that you

can recall, American City Fund, Inc., having an ownership interest in since January 1, 1990?

A Not at this time.

Q What is the corporation's current status? Is it still active?

A I have no idea.

Q Do you and/or any of your entities still have an ownership interest in American City Fund, Inc.?

A No idea.

Q Do you or any of your entities ever sell any interest in American City Fund, Inc.?

A I have no idea.

Q As you sit here today, do you recall ever selling any interest in American City Fund, Inc., ever?

A Possibly.

Q When?

A Don't recall.

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Q Did anyone foreclose on any interest in American City Fund, Inc., since September 7th 1994?

A Possibly.

Q When?

A I have no idea.

Q What documentation exists with respect to that, if at all?

A I have no idea.

Q Have you ever seen any documentation relating to a foreclosure of American City Fund, Inc.?

A Not that I can remember.

(Vol. 6, 945:21-947:1)

Additional examples of Respondent's evasive and incredulous responses are set forth in Paragraph I and Paragraph II of the Appendix. (See Paragraph I of the Appendix, commencing at page 1, line 4 through page 90, line 14; see Paragraph II of the Appendix, commencing at page 90, line 15 through page 173, line 15).

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VIII. RESPONDENT INTENTIONALLY PRODUCED VOLUMINOUS DOCUMENTATION WHICH WAS NOT RESPONSIVE TO THE AMENDED NOTICE: On May 28, 1999, Petitioner served a Notice of Taking Deposition and Request for Production of Documents on Respondent (hereinafter, the "NOTICE"). Thereafter, on June 16, 1999, Respondent proceeded, ex parte, to limit the time period for production, requesting that Petitioner be precluded from seeking records from Respondent prior to April 7, 1999, the date on which the Court granted Petitioner's Motion to Reopen Discovery. In the alternative, Respondent sought to limit the documentation produced by Respondent to the time period following the September 1996 document production by Respondent. Thus, Respondent expended efforts to restrict the document production. On June 16, 1999, the Court directed Petitioner to limit the time period set forth in an amended NOTICE to *September 1, 1996* for any categories for which Petitioner had previously requested records from Respondent (herein referred to as the "AMENDED NOTICE").

As is set forth in the Order filed with the Court on May 26, 1999, Petitioner initially estimated that Respondent's deposition would last between five to seven days. Respondent produced voluminous documentation at his deposition, over a period of 3 1/2 days, which was not responsive to the AMENDED DEMAND and/or was stale. Due to the volume of non-responsive documentation produced by Respondent and the manner in which Respondent conducted himself, the deposition was prolonged unnecessarily and the amount of time

Petitioner had to pose questions to Respondent was diminished. Petitioner had to seek a court order to extend the deposition. Respondent also produced documents which he had obtained from Petitioner or which he previously produced to Petitioner, including documents which had been bate stamped by the former Discovery Referee which also prolonged the deposition. Examples of the documentation produced by Respondent which were not responsive to the AMENDED NOTICE are set forth in Paragraph VIII of the Appendix, commencing at page 191.

IX. **RESPONDENT'S CONDUCT WAS EGREGIOUS:** Respondent's conduct at his June 1999 deposition constituted egregious conduct warranting severe discovery sanctions.

X. **THE MANNER IN WHICH RESPONDENT AND HIS COUNSEL CONSULTED DURING THE DEPOSITION WAS INAPPROPRIATE AND INTERFERED WITH THE DEPOSITION:** The Discovery Referee observed Respondent and his counsel conferring with each other on a number of occasions while questions from Petitioner's counsel were pending or while Petitioner's counsel was in the middle of asking Respondent a series of questions regarding a particular subject matter. The following examples illustrate the difficulty Petitioner's counsel encountered in obtaining responses from Respondent which were not coached by his counsel:

> Q Do you know if any of the properties were lost to foreclosure after September 1, 1996?

A Do I know it like this?

Q Yes. Sitting here today do you recall whether any of these properties listed in your declaration were lost to foreclosure after September 1, 1996?

A I believe so, but I —

Q Do you know which ones?

A Can I look at the list?

MR. FREID: Certainly. I'll give you your declaration back again, the balance of the document.

(Witness and counsel confer.)

MR. FREID: Mr. Tepper, it's one thing for your client to ask to talk to his lawyer. It's another thing for the lawyer to assume and start the conversation with a client when a question is pending. It's improper and I'm going to stop you from doing it.

MR. TEPPER: I'm not going to unless the Judge ordered me —

THE COURT: **I ordered you the other day. It seems** —

MR. TEPPER: I can't consult my client?

THE COURT: Excuse me. The result of that was that there was a request that the reporter note every time there was an on-the-record conference between you and your client. Now, if you have an objection to state on the record to a question asked, the lawyer may do so, and your client may stop and wait for a ruling on the objection. If your client has a question and wants to ask you something, then the client will so indicate on the record and we will all stop while he asks his question; is that clear?

MR. TEPPER: No.

THE COURT: It's not clear?

MR. TEPPER: No. Are you saying that I cannot unilaterally talk to my client?

THE COURT: That's right. You're the lawyer. You state an objection. If you want a recess to do what you have been doing, going outside and conferring with your client, by all means, ask for the recess.

MR. TEPPER: Then I'd like a recess. I thought it would be quicker to whisper in his ear.

THE COURT: No. It's not quicker. The result of that has been the appearance — the appearance — I'm not saying the reality — the appearance of your creating responses for your client, an appearance you do not want to create.

MR. TEPPER: Your Honor, I don't care if I create it or not. That's not what's going on, so if —

THE COURT: If you want a recess, you take a recess, fine.

MR. TEPPER: That's what I'll do.

THE COURT: You can discuss —

THE WITNESS: Can I take this with me when I go?

MR. FREID: I have no objection.

THE COURT: Fine.

(Vol. 4, 538:12-540:16)

Q Did you receive notice of sale of the properties regarding each of those defaults?

A I cannot say a hundred percent, but I believe it is a hundred percent.

MR. TEPPER: Now that there's no question pending, is it proper for me to talk to my client since there's no question pending?

MR. FREID: I'm not —

MR. TEPPER: There's no question pending.

MR. FREID: Your Honor —

THE COURT: **Mr. Tepper, look, this is supposed to be your client's deposition. I don't think you get it. This is a deposition of your client. He's supposed to give his best recollection. You are here not as another deponent.**

MR. TEPPER: I understand that, your Honor.

THE COURT: Not as a dual — no, you better listen to me now — not as a dual deposition, you and your client. You're here to provide legal guidance for your client.

MR. TEPPER: That's what I'm trying to do.

THE COURT: Excuse me. If you are a business associate or want to place yourself in the position of being a business associate of

your client and work with him on this deposition for purposes of providing responses, please get sworn so that the two of you can answer questions under oath. Otherwise stay out of it unless you have a legal objection. Yesterday — I don't mean yesterday — but the day before yesterday and on Monday you showed that you were quite capable, and even this morning, of making legal objections when there's something either wrong with the question or when you think that the question is in some manner inappropriate or not properly answerable as, for example, when you made Fifth Amendment objections. We had to have a colloquy and there had to be a ruling on it, but there is no basis whatsoever for you constantly sitting here and having a discussion with your client and waiting for Mr. Freid or somebody else to take a breath so you can say there's no question pending. You know, if —

MR. TEPPER: May I respond, your Honor? I resent the accusation you're saying that I should be in business — or I'm coaching my client. I have not — I've done nothing other than give him legal advice every time I've talked to him. If you want I can submit you a brief that shows that I have the right to do that. I have given him nothing but legal advice. I'm not coaching him. I would like to take a break to give him more legal advice. We can

step outside. I think that will take longer and longer. When you say it's improper I don't agree with that, but I waited until there was no question pending so I could talk to my client. That's it. So I'd like to step outside and talk to my client and we'll be back in 30 seconds.

MR. FREID: Can I make a comment with the Court's permission.

THE COURT: All right.

MR. FREID: When I'm in the middle of questions it's not like the first question is asked and he answers and you want to talk to your client. The objection is because I'm in a series of questions, you may not like what he's answering, knowing what may be coming and what's happening, and then you interrupt those questions so that you can go out and give him guidance. He's not asking for your help, and if he's not asking for your help the fact that you may not like what he's testifying to doesn't give you, in my opinion, the privilege or right to recess this deposition so you can go out and coax him or coach him or tell him what's coming so that he knows how to answer the questions, and that's the inference - that's the inference that's raised by these types of interferences. That's what the law says and that's what I'm going to comment on.

(Vol. 4, 544:16-547:16)

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XI. **THE DISCOVERY REFEREE WAS PRESENT EVERY DAY OF RESPONDENT'S DEPOSITION EXCEPT JUNE 23, 1999:** The Discovery Referee was present during every day of Respondent's deposition and the document production, except for Wednesday, June 23, 1999. On June 23, 1999, Respondent's deposition was limited to the production of documents.

XII. **THE DISCOVERY REFEREE WAS PRESENT DURING EVERY DAY OF THE DEPOSITION WHEN RESPONDENT GAVE LIVE TESTIMONY:** The Discovery Referee was present during every day of Respondent's deposition when Respondent gave live testimony. The Discovery Referee observed Respondent giving testimony in response to the questions posed by Petitioner's counsel and Respondent's counsel. The Discovery Referee was able to observe Respondent's body language, facial expressions, and demeanor during his deposition. The Discovery Referee also observed the time elapsed between the questions posed to Respondent and Respondent's answers.

XIII. **RESPONDENT WAS BELLIGERENT:** Respondent was belligerent and sarcastic on a number of occasions during his June 1999 deposition. Respondent's testimony on June 30, 1999 serves as one of many instances during which Respondent conducted himself in a hostile and belligerent manner during his deposition:

> Q The real property located 10142 National Boulevard in Los Angeles, California?

A No ownership.

MR. TEPPER: What was your answer? No ownership? Josh, I didn't even hear you.

THE WITNESS: Correct.

MR. TEPPER: Don't answer with a toothpick in your mouth. I can't hear you.

BY MS. LEVINE:

Q Did you or one of your entities acquire an ownership interest in the property located at 10142 National Boulevard in Los Angeles after September 7th 1994?

A Can you repeat the beginning? Did I or what?

Q Did you or — **Mr. Michaely, if you turn around, it will probably be better for you to hear. It will probably be easier for me to hear you as well.**

A **I rather not look at you.**

Q There's a lot of things I rather not be doing but I think if you cooperate, it will go more smoothly and, hopefully, we'll conclude earlier. If you would please try to cooperate.

A This is my good ear, and this is the ear I could hear the best. I've done it the whole day yesterday. When I do like this, I don't hear you so good. So I would appreciate it if you let me do it this way.

Q The first five days of the deposition, Mr. Michaely, you did not sit in that position. So I would appreciate it if you would turn around and face me so I can hear you.

A I will try to articulate for you.

MS. LEVINE: Madam reporter, would you please read the question back to Mr. Michaely.

(Record read.)

THE WITNESS: **I don't recall.**

(Vol. 8, 1214:12-1215:23)

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XIV. RESPONDENT HAS FAILED TO COMPLY WITH OTHER DISCOVERY: Respondent also has failed to comply with discovery propounded by Petitioner in the past, including the following discovery:

1. Respondent acknowledged during the deposition that he maintained financial documents in a storage facility in Texas. Petitioner propounded formal discovery on Respondent during the dissolution proceedings and that he did not produce any documents to Petitioner from said Texas storage facility. Petitioner served on Respondent the following discovery seeking documents from Respondent: (a) Petitioner's Demand for Production of Documents (Set One) on February 21, 1995; (b) Petitioner's Demand for Production of Documents (Set Two) on or about August 7, 1996; (c) Petitioner's Notice of Taking Deposition and Request for Production of Documents served on Respondent on February 21, 1995; and (d) Petitioner's Notice of Taking Deposition and Request for Production of Documents on May 28, 1999. The Court further finds that Respondent acknowledged that he never produced any of the financial documents to Petitioner from the Texas storage facility in response to the document requests propounded by Petitioner during the subject marital dissolution proceedings.

2. On August 9, 1996, Petitioner served Special Interrogatories on Respondent. On September 30, 1996, Respondent served his First Response to Special Interrogatories, in which he objected to all Interrogatories between numbers 36 and 300. Significant

efforts were expended to compel Respondent to Answer said Special Interrogatories. Petitioner was forced to file two separate motions to compel Respondent to answer the Special Interrogatories. On November 14, 1996, Petitioner filed her first Motion to Compel Further Responses to Special Interrogatories. On December 17, 1996, the Honorable Richard Denner, Judge, referred the matter to Philip Saeta, Retired Judge, as discovery referee. Respondent was ordered to pay for the discovery fees. Despite Petitioner's repeated requests for Respondent to pay the fee for the discovery referee, Respondent refused. Petitioner did not have her own funds to pay for the discovery referee. As a consequence, Petitioner filed an application with the Court to modify the charging order against Respondent's interest in VNSP so that Petitioner could apply any funds received by her from the charging order to pay for the discovery referee. Petitioner's request was granted, and Petitioner paid for the discovery referee.

It was not until May 1997 that Judge Saeta started to commence work on this matter, because Respondent would not pay the discovery fees he was ordered to pay. The Reference Report was issued in August 1997.

On August 20, 1997, the Court issued its own order to show cause why Judge Saeta's Reference Report, relating to Special Interrogatories, should not be adopted. On August 16, 1997, Respondent filed opposition to the Reference Report. On November 20, 1997, the Court adopted the Referee's Report re Special Interrogatories. On December 22, 1997, Respondent

served his Supplemental Responses to Special Interrogatories. His Responses were insufficient, and Petitioner had to meet and confer with opposing counsel. Petitioner filed a second motion to compel and for sanctions.

On March 28, 1998, Respondent served Petitioner with his Further Supplemental Responses to Special Interrogatories. In his last set of Responses, although he answered the balance of the interrogatories, he primarily answered that he either did not know the answers and/or that he did not have documents in his possession or under his control to enable him to respond (i.e., they were allegedly lost or misplaced.)

In March 1995, Petitioner took Respondent's deposition for approximately 1 1/2 days with respect to the issues relating to Petitioner's initial Order to Show Cause, as Respondent's former counsel and Petitioner's counsel agreed that each party's deposition would be limited in scope to the order to show causes issues, only. Petitioner's counsel recessed Respondent's March 1995 deposition. In 1996, Petitioner served Respondent with a Notice of Taking Deposition and Request for Production of Documents. Although Respondent's deposition was not terminated, new counsel for Respondent took the position that Petitioner did not have the right to resume with Respondent's deposition. Thereafter, Petitioner sought, and obtained, permission from the Court in 1996 to depose Respondent.

Furthermore, the hearing on the subject Motion For Sanctions was set for September 16, 1996. Respondent subsequently requested that Petitioner's Motion for Sanction be continued. Pursuant to Respondent's request, the Court directed the parties to continue Petitioner's Motion for Sanctions. Petitioner's Motion For Sanctions was continued until October 7, 1999. Respondent testified at his June 1999 deposition that he resided in Israel and in pleadings filed with the Court in April 1999 that he resided in Israel. On the eve of the hearing on Petitioner's Motion for Sanctions, Respondent purportedly relocated to Nevada and filed for bankruptcy, thereby automatically staying Petitioner proceeding with her Motion for Sanctions. Petitioner subsequently sought and obtained relief from the Nevada Bankruptcy Court to enable her to proceed with her Motion for Sanctions. The timing of Respondent's relocation to Nevada and filing for bankruptcy on the eve of the hearing on Petitioner's Motion for Sanctions raises suspicions that Respondent was attempting to thwart and/or delay the hearing on Petitioner's Motion for Sanctions.

XV. THE COMMUNITY ESTATE HAD A NET VALUE IN EXCESS OF $21 MILLION ON THE DATE OF SEPARATION: Respondent acknowledged at his June 25, 1999 deposition that he caused a financial statement to be prepared which reflected that the community estate had a net worth of $21,791.162 for the third quarter of 1994. Respondent also acknowledged that he submitted said financial statement to a third party in connection with various business transactions.

(Vol. 5, 827:3-842:12) The financial statement is part of Exhibit 29 to Respondent's June 1999 deposition.

In conclusion, the Discovery Referee finds that, at his deposition, Respondent's responses were so evasive, inconsistent and unbelievable as to render him totally lacking in credibility.

RECOMMENDATIONS:

I. **VARIOUS FACTS SHALL BE ESTABLISHED AS TRUE IN ACCORDANCE WITH PETITIONER'S CLAIMS:** The following facts are established as true in accordance with Petitioner's claims at the trial on reserved issues (hereinafter, the "TRIAL") and at any proceedings pending the TRIAL, except as is otherwise specifically set forth in this Recommendation:

A. Respondent had management and control over the community estate during marriage and subsequent to the parties' date of separation of September 7, 1994, except that Petitioner was awarded management and control of the improved real property located at 17734 Miranda, Tarzana, California on August 28, 1996; and David Pasternak was appointed as the receiver for Van Nuys Star Partnership on September 3, 1997.

B. Pursuant to California Family Code section 1100, Respondent owed a duty to Petitioner in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having

relationships of personal confidence, as specified in Section 721, until such time as the assets and liabilities have been divided by Petitioner and Respondent or by a Court. Pursuant to Family Code section 721, a confidential relationship exists between Petitioner and Respondent. Said confidential relationship imposes a duty of the highest good faith and fair dealing on Respondent and Petitioner. Respondent's duty to Petitioner includes the obligation to make full disclosure to Petitioner of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has, or may have an interest, and debts for which the community is, or may be liable, and to provide Petitioner equal access to all information, records and books that pertain to the value and character of those assets and debts upon request.

C. Respondent failed to adhere to the requirements imposed by California Family Code section 1100.

D. Respondent breached his fiduciary duty to Petitioner and to the community estate.

E. Respondent willfully and maliciously engaged in acts to deprive Petitioner of her share of the community estate, to her financial detriment.

F. The community estate had a net value of $21,791,162 as of the date of separation.

G. Respondent was the financial caretaker of Petitioner throughout the parties' marriage prior to their separation.

H. Petitioner and Respondent expended, on the average, approximately $35,000 per month to maintain the marital standard of living established by the parties during the last several years of marriage prior to September 7, 1994.

I. Petitioner needs at least $19,000 per month from Respondent, as and for spousal support, to meet her needs based upon the marital lifestyle.

J. Respondent has the ability to pay Petitioner any spousal support based upon the marital lifestyle.

II. RESPONDENT SHALL BE PRECLUDED FROM OPPOSING VARIOUS CLAIMS MADE BY PETITIONER: Respondent is precluded from opposing the following claims made by Petitioner at the TRIAL or at any proceedings pending the trial on reserved issues, except as is otherwise specifically set forth in this Recommendation:

A. Respondent had management and control over the community estate during marriage and subsequent to the date of separation of September 7, 1994, except that Petitioner was awarded management and control of the improved real property located at 17734 Miranda, Tarzana, California on August 28, 1996; and David Pasternak was appointed as the receiver for Van Nuys Star Partnership on September 3, 1997.

B. Respondent misappropriated community real properties, including the following community property

real properties: 4235 Cornell Road, Agoura, California; 16260 Ventura Boulevard, Encino, California; 22225 Erwin, Woodland Hills, California; Fairfax Apartments (also known as the Bordeaux property); 12335 Gault Street, North Hollywood, California; 8333 Hatteras, Unit 52, Tarzana, California; 8800 Kester, Unit 124, Panorama City, California; La Arboleta Apartments, San Antonio, Texas; 6931/6939 Van Nuys Blvd., Van Nuys, California (held in the name of Van Nuys Star Partners); 29348 Roadside Drive, Agoura, California; 200 Palmdale Blvd., Palmdale, California; 7500 San Felipe, Houston, Texas; 700 W. Bennett St., Compton, California; 1915 Apex Avenue, Los Angeles, California; 17734 Miranda St., Tarzana, California; 19684 National Trails, Oro Grande, California (also known as Oro Grande Apartments); 5201 Bordeaux Road, Dallas, Texas; 10747 Wilshire Blvd., Los Angeles, California; 2002 N. Gateway Blvd., Fresno, California; 23591 El Toro/24551 Raymond Rd., Lake Forest, California (also known as Plaza Jardin); 1481 West 7th Street, Upland, California; Las Brisas Apartments located in Signal Hill, California; 241 S. Mariposa Ave., Los Angeles, California (also known as Mariposa Manor Apartments) 10142 National Blvd., Los Angeles, California; 1723 North Crescent Heights Blvd., Los Angeles, California; 8545 Columbus Avenue, North Hills, California; 4811 North University Drive, Lauder Hill, Florida (also known as Lauder Hill Self-Storage); 5370 South University Drive, Davie, Florida (also known as Davie Self-Storage); The Argyle Hospital, located in Argyle, Texas; 13222 San Pablo Ave., San Pablo, California, (a K-mart Shopping Center); 5963/5965 Washington Boulevard, Culver, City, California; 18315/ 18320 Ventura Boulevard, Tarzana, California.

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C. Respondent misappropriated community property entities, including the following community property entities: AIB Associates, Ltd.; Agoura Fortune Partners, Ltd.; Agoura Shopping Partners, Ltd.; American City Fund, Inc.; American City Realty; American City Secured Properties; Arboleta Associates, Ltd., a Texas partnership; Central Roofing Co., Inc., a Nevada corporation; CLM Development Corporation; Chai Properties; Columbus Regal Partnership, Ltd.; Continental Pacific Properties; Cornell 4235 Partners; Costa San Pablo Associates, Ltd.; Courtyard Gardens Partnership, Ltd.; Crescent Heights Regal Partnership, Ltd.; Crest Realty Holdings; Dumont St., L.P.; Encino Holdings, Inc.; Fairfax California Partners, Ltd.; Fresno 2002 Ventures, Ltd.; Gateway Investors, Ltd.; Gault Partnership, Ltd. (also known as Trinity Investments); Global Arabian Partnership, Ltd.; Gross Financial Partners; G&G Sprinkler System Co. (aka G&G Fire Sprinklers, Inc.); Interstate Investors, Inc.; J.M. Real Estate Holdings, Inc.; Joel Pacific, Ltd.; Las Brisas, Ltd.; Mariposa Manor Associates, Ltd.; Michaely & Moscowicz, Ltd.; Midway Hotel Corporation; Pacific Luxury, Ltd.; Regal American, Inc.; Regal International, Inc.; Regal Medical Partners, Ltd. (formerly Tower Medical Company); Regal One Corp.; Regal Orange Partners, L.P. (formerly Diamond National Assoc., Ltd.); Regam Building Management, Ltd.; Regency House Apartments; R.N. Real Estate, Inc.; Regal Building Management, Ltd.; San Felipe Office Plaza, Inc., a Nevada corporation; San Pablo Partners; Signal Hill Nevada Partnership, Ltd.; Signum Holdings; Surfwood Palms Partners; Trinity Investments, Ltd.; Valley Pacific

Partners, Ltd.; Van Nuys Star Partners; Willow Partners, Ltd.; 501 Alvarado Partners, Ltd.; and, 4801 Wilshire Partners, Ltd.; Columbus Regal Partnership, Ltd.; Crescent Heights Regal Partnership; Surfwood Palms Partners.

D. Respondent misappropriated community property life insurance policies, including the following community property life insurance policies: Aurora National Life Assurance Company, whole life policy no. C1 1608052L; United of Omaha Life Insurance Company, policy no. Bu6128514; and, Northwestern Mutual Life, extra ordinary whole life policy no. 9-896-412.

E. Pursuant to California Family Code section 1100, Respondent owed a duty to Petitioner in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence, as specified in Section 721, until such time as the assets and liabilities have been divided by Petitioner and Respondent or by a Court. Pursuant to Family Code section 721, a confidential relationship exists between Petitioner and Respondent. Said confidential relationship imposes a duty of the highest good faith and fair dealing on Respondent and Petitioner. Respondent's duty to Petitioner includes the obligation to make full disclosure to Petitioner of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has, or may have an interest, and debts for which the community is, or may

be liable, and to provide Petitioner equal access to all information, records and books that pertain to the value and character of those assets and debts upon request.

F. Respondent failed to adhere to the requirements imposed by California Family Code section 1100.

G. Respondent breached his fiduciary duty to Petitioner and to the community estate.

H. Respondent perpetrated a fraud against Petitioner while he had an obligation to act as a fiduciary to Petitioner.

I. Respondent willfully and maliciously engaged in acts to deprive Petitioner of her share of the community estate, to her financial detriment.

J. That the community estate had a net value of $21,791,162 as of the date of separation.

K. That Respondent was the financial caretaker of Petitioner throughout the parties' marriage prior to their separation.

L. That Petitioner and Respondent expended, on the average, in excess of $35,000 per month to maintain the marital standard of living established by the parties during the last several years of marriage prior to September 7, 1994.

M. That Petitioner needs at least $19,000 per month from Respondent, as and for spousal support, to meet her needs based upon the marital lifestyle.

N. Respondent is precluded from introducing any evidence (whether written or oral) which he has not provided to Petitioner, to date, that Respondent does not have the ability to pay Petitioner at least $19,000 per month, as and for spousal support.

III. **IN THE EVENT THAT RESPONDENT OPPOSES THE COURT ADOPTING THE REPORT AND RECOMMENDATIONS OF JUDGE GOLDIN, RESPONDENT IS LIMITED TO OPPOSING THE RECOMMENDATION WITH EVIDENCE WHICH HE PREVIOUSLY PRODUCED TO PETITIONER**: Respondent is limited to opposing this Recommendation by submitting evidence which he previously produced to Petitioner. However, Respondent is precluded from opposing the Recommendations with any evidence he failed to produce to Petitioner prior to the hearing on Petitioner's Motion for Sanctions.

IV. **MONETARY SANCTIONS SHOULD BE ISSUED AGAINST RESPONDENT**: Monetary sanctions are imposed against Respondent in the sum of $110,000. Accordingly, Respondent shall forthwith pay, directly to Freid and Goldsman, the sum of $110,000, as monetary sanctions, pursuant to Code of Civil Procedure sections 2023 and 2025. The basis for said monetary sanctions is, inter alia, (1) the Court finds that the fees and costs incurred by Petitioner are reasonable and necessary;

(2) the issues attendant to Petitioner's Motion were complex; and (3) Respondent's conduct at his June 1999 deposition and failure to comply with the AMENDED NOTICE constituted an egregious abuse of the discovery process warranting the imposition of monetary sanctions, and (4) Respondent's opposition was without substantial justification.

V. RESPONDENT SHOULD BE ORDERED TO PAY ALL ADDITIONAL COSTS INCURRED BY THE DISCOVERY REFEREE, AS SANCTIONS: Forthwith on entry of this Order, as further sanctions, Respondent shall pay all additional costs incurred by the Discovery Referee in connection with issuing her Recommendation and Proposed Order, including the time she expends to consider any objections thereto.

DATED: 2 October, 2000

Respectfully submitted,

s/ Martha Goldin
Martha Goldin, Referee

Appendix B

PROPOSED ORDER:

The Court has read and considered the Discovery Referee's Report, Findings, and Recommendations [Objections and Response to Objections] [and Argument of Counsel], and now adopts the Referee's Findings and Recommendations. Based thereon, and good cause appearing, IT IS ORDERED THAT THE RECOMMENDATIONS OF THE DISCOVERY REFEREE ARE THE ORDER OF THE COURT.

THE ORDERS ON PETITIONER'S MOTION FOR SANCTIONS ARE WARRANTED AND NECESSARY: The Orders rendered in connection with Petitioner's Motion for Sanctions are reasonable and necessary in order to level the playing field so as to prevent Petitioner from being prejudiced by Respondent's willful and egregious misuse of the discovery process.

THE IMPOSITION OF LESSER SANCTIONS WOULD NOT REMEDY RESPONDENT'S ABUSE OF THE DISCOVERY PROCESS: The imposition of lesser sanctions would not remedy Respondent's abuse of the discovery process. Respondent's consistent evasion, coupled with Respondent's responses which were blatant untruths and not credible, amounted to an egregious abuse of the discovery process.

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ORDER

The Court approves and adopts the recommendations and findings of the Referee, and, good cause appearing therefor, IT IS SO ORDERED.

DATED: JUN 20 2002

s/ John H. Sandoz
JOHN SANDOZ,
JUDGE OF THE
SUPERIOR COURT

APPENDIX C — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED JULY 25, 2007

Court of Appeal, Second Appellate District,
Div. 5 - No. B186705
S153708

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PATTI MICHAELY,

Respondent,

v.

JOSHUA MICHAELY,

Appellant.

The petition for review is denied.

Werdegar, J., was absent and did not participate.

GEORGE
Chief Justice

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No. 07-551

FILED
DEC 18 2007
OFFICE OF THE CLERK
SUPREME COURT

In The

Supreme Court of the United States

JOSHUA MICHAELY,

Petitioner,

v.

PATTI MICHAELY,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The Second District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

According to the Petition for Writ of Certiorari:

This case presents a very important question to be resolved concerning the imposition of discovery sanctions: does the trial court have an affirmative duty to impose sanctions tailored to remedy the specific discovery abuse and to ensure such sanctions are not imposed as a punishment, or does the trial court have plenary power to impose any sanctions it sees fit, no matter how broad and how punishing, and no matter if it strips a litigant of their right to be heard at trial? If plenary power to punish is permissible, then what if any limitations does the due process clause impose on such punishment for discovery abuse?

According to Respondent, the Question is:

Where a party such as Petitioner has been found to have been intentionally evasive in responding to discovery – even lying to avoid giving substantive responses – did the trial court abuse its discretion in (i) precluding that party from presenting evidence on the subjects as to which substantive responses were evaded, and (ii) establishing facts about the evaded subjects against the offending party?

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JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. §1257(a), apparently claiming that his right to due process was violated by the trial court's imposition of discovery sanctions and that the violation was not rectified by the California Court of Appeal.

A federal question was not, however, presented in the California proceedings; and the published opinion of the California Court of Appeal expressly provides that it is not based on a consideration of any federal (or state) due process constitutional provision.

Further, the action of the California Court of Appeal in upholding the imposition of sanctions is consistent with the federal discovery rules and with federal case authorities which have examined the same legal issues and found no constitutional due process violation where a litigant has willfully failed to provide discovery so as to deprive the other party of relevant facts. (E.g. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); *Roadway Express, Inc. v. United States Department of Labor, Administrative Review Board* 495 F.3d 477 (2007).)

COUNTER STATEMENT OF THE CASE

The findings and order of the trial court ("Report and Order") included a finding that Petitioner had intentionally given evasive responses at his lengthy

deposition and that his evasiveness was pervasive and egregious. (Pet. App. 19a; CT, vol. 49, 10021:9-11.)[1] The findings also stated that Petitioner's conduct rose to "a glaringly obtrusive level . . . so as to intentionally undermine [Respondent's] discovery efforts and render his appearance at the deposition the equivalent of [Petitioner] refusing to sit for his deposition as directed by the Court Order filed . . . on May 26, 1999." (Pet. App. 19a; CT, vol. 49, 10021:12-15.)

Among the other findings was the determination that Petitioner's testimony was willfully untruthful (Pet. App. 26a), as well as inconsistent and incredible. (Pet. App. 32a., CT, vol. 49, 10028:24-26.) The Report and Order gives numerous examples to support the findings (Pet. App. 27a-52a), and is supported further by a 208 page Appendix with additional examples. (CT, vol. 49, 10019 – vol. 50, 10270.)

The trial court also found that Petitioner had a history of resisting Respondent's discovery efforts and had failed to produce any of the records that he kept in a Texas storage facility. (Pet. App. 73a-75a; CT, vol. 49, 10052-10055.)

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[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari, and the number(s) following refer to the specific page(s) of the Appendix. "CT" refers to the Clerk's Transcript prepared for the proceedings in California. "Vol." refers to the Volume of the Clerk's Transcript, and the number(s) following refer to the specific page(s).

Finally, the trial court found that the "imposition of lesser sanctions would not remedy [Petitioner's] abuse of the discovery process." (Pet. App. 86a; CT, vol. 49, 10061:18-22.)

The Report and Order did not provide for any terminating sanctions (e.g. striking Petitioner's answer, or declaring a default.) Instead, it provided for issue and evidentiary sanctions as to the value of the community estate at separation, Petitioner's management and fiduciary duties, Petitioner's breach of those duties, the marital standard of living, and Petitioner's ability to pay support. (Pet. App. 77a-79a; CT, vol. 49, 10055:15-10056:24.) Additional evidentiary sanctions precluded Petitioner from offering evidence to counter claims of his misappropriation of numerous specified assets. (Pet. App. 79a-83a; CT, vol. 49, 10057:10-10058:27.)

Each evidentiary preclusion corresponded to an asset as to which Petitioner had failed to supply substantive information at his deposition. (E.g. Pet. App. 79a-82a; CT, vol. 49, 10043:17-10044:28; & 10057:10-28.)

In light of these findings, there were really only two questions presented for review before the California Court of Appeal: (1) did substantial evidence support the trial court's findings, and (2) based on the findings, were the sanctions imposed within the trial court's broad range of discretion?

The Court of Appeal answered both of these questions in the affirmative and consequently affirmed.

Petitioner did not raise any due process or other federal questions in his challenge in the trial court. (CT, vol. 41, 8301-8318.) And, except for Petitioner's argument about the trial court's utilization of the collateral estoppel doctrine to adopt the findings made earlier by a bankruptcy judge, neither the United States Constitution nor any federal statute formed the basis of Petitioner's challenge in the California appellate proceedings. As to Petitioner's collateral estoppel argument, the California Court of Appeal decision states:

> We need not reach the merits of [Petitioner's due process] arguments. Petitioner does not tell us which issues were "litigated and resolved by the Bankruptcy Court," so that we cannot tell what effect the collateral estoppel finding had. Moreover, even if, as he asserts, the court adopted [the discovery referee's] report based on the bankruptcy court's findings, it was at most an alternative ground. A ruling on collateral estoppel could make no difference here. (Pet. App. 14a-15a.)

Two important conclusions can be drawn from the foregoing: (1) Petitioner's due process argument was confined to the collateral estoppel issue – which he has not raised in his Petition for Writ of Certiorari, and (2) the California Court of Appeal did not reach

the due process issue in affirming the discovery sanctions and judgment.

As a result, no "state court of last resort has decided an important federal question . . . " as that term is used in Rule 10 of the Rules of the Supreme Court of the United States. It is also doubtful that a "right specially set up or claimed under the Constitution . . . " has been implicated in any of the California proceedings that preceded Petitioner's present Petition for Writ of Certiorari. Consequently, Petitioner has failed to demonstrate a compelling reason for a writ of certiorari to be granted.

SUMMARY OF ARGUMENTS

As Petitioner is now before this Court, he has – for the first time in the appellate history of this action – referred to the Constitution of the United States. In none of the earlier appellate proceedings, including the Petition for Review to the California Supreme Court, did Petitioner cite to the federal constitution or federal case law. Even in the Petition for Writ of Certiorari, Petitioner cites no federal decisions. Accordingly, Petitioner has not truly presented a federal question nor has he preserved a federal question for review by this Court.

What was at issue below was whether the trial court had abused its discretion in (1) imposing discovery sanctions which established certain facts as true, and (2) precluding Petitioner from introducing

evidence as to certain issues. This is the same standard of review that this Court has applied to federal actions. (E.g. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976).)

Additionally, Petitioner has inaccurately described certain aspects of the record and the decision of the California Court of Appeal.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. Petitioner Did Not Present an Important Federal Question to the California Appellate Courts, Nor Has He Presented One in His Petition

When the Petition for Writ of Certiorari quoted Section 1 of the Fourteenth Amendment to the United States Constitution, it represented the first time in all of the appellate proceedings that the Fourteenth Amendment or the federal constitution had been mentioned by Petitioner.

Petitioner did not refer to the federal constitution in his Opening Brief or his Reply Brief before the California Court of Appeal. Petitioner did not refer to the federal constitution in his Petition for Review to the California Supreme Court. As noted earlier, Petitioner made a "due process" argument in the California Court of Appeal, but it concerned a matter not raised in the Petition for Writ of Certiorari to this

Court, that is: the trial court's use of the collateral estoppel doctrine.

In the Petition for Review to the California Supreme Court, the words "Due Process" are mentioned once, on page 29, but only in connection with Petitioner's complaint about the trial court's **alleged** failure to explain how the sanctions were tailored to redress Petitioner's failure to give substantive responses to deposition questions.

Even assuming *arguendo* that the "due process" arguments made to the California appellate courts were the same as those presented in the Petition for Writ of Certiorari, it is not clear that Petitioner was even referring to the United States Constitution as opposed to the California Constitution, which also has a due process clause. (Cal. Const. Art. 1, § 7.) This is of particular note since the proceedings were in California, where it would be logical to assume that the California Constitution would have been implicated in the proceedings before any consideration of the federal constitution.

Finally, in this regard, it should be noted that the Petition for Writ of Certiorari cites no decisions of this Court or any federal court to support his purported federal question presentation. This lack of federal authority is consistent with the briefs and Petition for Review filed by Petitioner in the California appellate system. Instead of citing federal decisional law, Petitioner refers to the same California cases he cited in the California proceedings – none of

which purport to determine a federal question. Only one of the California cases, *Vallbona v. Springer*, 43 Cal.App.4th 1525 (1996), addresses any due process arguments, but it rejects a "due process/denial of right to trial" argument similar to that alluded to in the Petition for Writ of Certiorari. (*Id.* at pp. 1546-1547.) Consequently, it does not aid Petitioner.

2. This and Other Federal Courts Have Already Upheld Severe Discovery Sanctions in Response to Due Process Challenges, So The Decision of the State Court Cannot Be in Conflict With Federal Court Decisions

Rule 37 of the Federal Rules of Civil Procedure governs discovery abuses in federal litigation. In particular, paragraph (b)(2)(A) delineates seven different sanctions that may be imposed for a party's failure to obey a discovery order. These sanctions mirror those authorized by the California Code of Civil Procedure, sections 2023.030 and 2025.450(d). Specifically, subparagraph (b)(2)(A)(ii) of Rule 37 empowers the trial court to prohibit a disobedient litigant from introducing evidence as to certain designated claims. This corresponds to the evidentiary sanctions described in California Code of Civil Procedure section 2023.030(c). Subparagraph (b)(2)(A)(i) of Rule 37 permits the court to direct that certain matters be taken as established. This corresponds to the issue sanctions described in California Code of Civil Procedure section 2023.030(b). And subparagraphs (b)(2)(A)(iii), (v) and (vi) of Rule 37, authorize the trial

court to strike pleadings, dismiss the action or render a default. These correspond to the terminating sanctions authorized by California Code of Civil Procedure section 2023.030(d).

Since Federal Rule 37 empowers federal trial courts to impose sanctions against litigants who disobey orders to provide discovery, it is not surprising that the federal judiciary has already addressed the potential due process challenges arising under federal litigation.

In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), this Court rejected a due process challenge to the imposition of a sanction for the failure of certain defendants to produce documents as required by the trial court. The discovery sanction established the contested issue of *in personam* jurisdiction against the offending defendants. (*Id.* at 699, 102 S.Ct. at 2102.)

In rejecting the due process challenge this Court cited its earlier decision in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909), where this Court held that a state court had not violated the due process clause by striking the answer and entering default against a defendant who had failed to comply with a pretrial discovery order.

Consistent with the foregoing is the Court of Appeals, Seventh Circuit, opinion in *Roadway Express, Inc. v. United States Department of Labor, Administrative Review Board*, 495 F.3d 477 (2007).)

There, an Administrative Law Judge had imposed a sanction which prevented the employer from presenting a certain category of evidence, the practical effect of which was to undermine the employer's defense. (*Id.* at 481.) The employer challenged the discovery sanction on due process grounds, but the Court of Appeals repulsed the challenge. At page 484, the Opinion rejects the employer's due process argument by analogizing to Rule 37 and the decision in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee.*

From these existing federal cases, it is clear that the California Court of Appeal decision is not in conflict with the decisions of the federal judiciary.

3. The Purported Question Presented by Petitioner Relies on Inaccurate Descriptions of the Record and the California Decision

The sections that follow describe three notable misstatements contained in the Petition for Writ of Certiorari.

A. Petitioner characterizes the decision of the California Court of Appeal as granting "license to all judges to impose any discovery sanctions they want for any behavior without need and regard to how

such sanctions are designed to redress the discovery abuse . . . " (Pet. 2.)[2]

This is a gross misreading of the Court of Appeal Opinion. The Opinion simply affirms the sanctions imposed by the trial court for Petitioner's egregious evasion of his duty to respond forthrightly to Respondent's discovery after being ordered to sit for his deposition.

The trial court did not "impose any discovery sanctions [it] want[ed to]" – it only imposed the sanctions authorized by California Code of Civil Procedure sections 2023.030 and 2025.450 for the offending conduct described in these statutes.

B. Petitioner also mis-characterizes the severity of the sanctions when he claims that he "was prevented from presenting any evidence of any kind at the trial of this matter." (Pet. 16-17) This is simply not true. The court did not strike Petitioner's pleadings or declare a default, and nothing in the Report and Order precluded Petitioner or his experts from testifying or offering documentary evidence concerning his ability to pay Respondent's fees, the reasonableness of Respondent's fees, the inflation issue or the amount of the support arrearage.

The order imposing sanctions only prevented Petitioner from presenting evidence concerning the value of the community estate at separation, Petitioner's

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[2] "Pet." refers to the Petition for Writ of Certiorari.

management and fiduciary duties, Petitioner's breach of those duties, the marital standard of living, and Petitioner's ability to pay support. (Pet. App. 79a-84a; CT, vol. 49, 10055:15-10056:24.) Petitioner was also precluded from offering evidence to counter claims of his misappropriation of numerous specified assets. (Pet. App. 79a-84a; CT, vol. 49, 10057:10-10058:27.)

C. Petitioner complains that the decision of the California Court of Appeal does not "contextualize" the sanctions. (Pet. 16.) However, this complaint is belied by the decision itself, where the California Court of Appeal wrote:

> Husband also contends that the sanctions were an abuse of discretion because Wife had all the information she needed from other sources, including the business records he produced, and that she could have gone to third parties to obtain the information she needed. When his record references are examined, Husband is relying on the fact that Wife obtained documents from his office at the inception of this action, in 1995, on the fact that he answered special interrogatories in 1998, and on a March 1995 letter from his counsel to her counsel listing twenty properties (including the family home and its contents) and several debts, putting a value on each, and suggesting a property distribution.
>
> Husband also cites Sowell's deposition, which Wife took in late 1998 or early 1999 after bringing two motions to compel, the first to obtain the deposition, and the second after

Sowell (represented by Husband's attorney) asserted rights under the Fifth Amendment to the United States Constitution and refused to answer any questions.

To state the facts is to refute them. The 1995 information was simply too old, given Husband's plethora of assets and the fact that, as Judge Denner found, Husband moved money from entity to entity, and, as Judge Saeta found, this was a complicated case involving tracing of assets. The 1998 interrogatories were prefatory to the deposition. There is no showing that the answers could replace the deposition, and no reason to assume so. We say the same about Sowell's deposition. Husband points out that in 1995, Wife declared that Sowell had access to the business and financial records at Husband's office and was authorized to sign on various bank accounts held by some of Husband's business entities, and that in her motions to compel, Wife alleged that Sowell was a critical witness. That does not mean that she could replace Husband as a witness.

In this portion of his brief, Husband also cites the facts that his support obligation was reduced $21.000 per month to $1,700 per month, based on evidence that his income was $5,000. This took place in September of 1999, and we cannot see that the finding is relevant to any issue on appeal.

Finally in this regard, Husband contends that the court erred by not considering the

> history of all discovery, arguing more specifically that the court erred in finding that Sowell's deposition was irrelevant and not to be considered in determining sanctions. The order Husband cites is the *referee's* order denying Husband's request that she consider Sowell's deposition testimony. Judge Goldin listed four grounds for her ruling: (1) the testimony is irrelevant to the motion for sanctions; (2) the Code of Civil Procedure did not authorize Husband to submit the deposition to the court on a sanctions motion (citing Code of Civil Procedure section 2025, subd. (u), since repealed); (3) the fact that Sowell sat for her deposition did not relieve Husband from his obligation to comply with discovery; (4) Husband failed to timely submit the testimony.
>
> Husband does not cite to anything which would show that he asked the trial court to consider the testimony. The trial court thus did not err.

As is clear from the foregoing quote, the Court of Appeal fully considered the prior discovery, and it is plain to see how it impacted its decision to affirm the judgment of the trial court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 07-551

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IN THE

Supreme Court of the United States

JOSHUA MICHAELY,

Petitioner,

v.

PATTI MICHAELY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF

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JURISDICTION

Respondent, in her Brief in Opposition to Petitioner's Writ of Certiorari, as more fully set forth below, misses the entire point of the instance proceedings and mis-characterizes the record below ***vis a vis*** Petitioner's claim to due process and equal protection under the Constitution of the State of California and the Constitution of the United States of America.

Further in the above regard, the Respondent, at Page 5, Lines 6 -12 of her Brief in Opposition, states in the most uncertain manner the following:

> It is also doubtful that a "right specially set up or claimed under the Constitution" has been implicated in any of the California proceedings that preceded Petitioner's present Petition for Writ of Certiorari. Consequently, Petitioner has failed to demonstrate a compelling reason for a writ of certiorari to be granted.

Respondent's "doubt" as to Petitioner's right to due process, equal protection, and fair treatment, as implicated at every stage of the California proceedings, sincere as it may be, is contrary to the record below and obvious merits of Petitioner's Writ of Certiorari.

One reason for the dubiousness on the part of the Respondent is made manifest at Page 4, Lines 4 – 5 of her Brief in Opposition, wherein it is stated as follows:

> Petitioner did not raise any due process or other federal questions in his challenge in the trial court.

In that the Respondent labors under this misimpression, as more fully set forth below, it is no wonder the Respondent erroneously concludes, at Page 5, Lines 3 – 6 of her Brief in Opposition, as follows:

> As a result, no "state court of last resort has decided an important federal question" as the term is used in Rule 10 of the Rules of the Supreme Court of the United States.

It is true, the California proceedings below obtained in State not Federal Court, more specifically and more importantly, in State Family Law Court, and, the issues before the court below were not robust federal constitutional questions. Yet, unlike the Respondent, Petitioner has no doubt, and is certain, that time and time again, in the record, Petitioner, both directly and indirectly, raised the question of Petitioner's due process, equal protection, and fair treatment under the Constitutions of California and the United States, and, in this respect, is entirely correct in his characterization of the California Court of Appeal's decision as granting what the Petitioner describes as follows:

> a license to all judges to impose any discovery sanctions they want for any behavior without need and regard to how such sanctions are designed to redress the discovery abuse.

Pet. 2.

For Petitioner to be in error, there must be a limit on the aforementioned judicial conduct someplace in the record below, and, in point of fact, there is no such limitation of record, not even by or under the Constitutions of the State of California or the United States, hence the instance Writ of Certiorari.

With regard to Petitioner's present assertions relevant to a lack of due process, equal protection, and fair treatment in the California proceedings, all as presented in Petitioner's Writ of Certiorari, there is no other special requirement as to the form, the manner, the substance, or the degree to which Petitioner must have raised these fundamental issues in his continuing and unrelenting challenge to the decisions of the court below.

In this particular regard, the assertion by the Respondent, at Page 4, Lines 26 – 28, as follows:

> Two important conclusions can be drawn from the foregoing: (1) Petitioner's due process argument was confined to the collateral estoppel issue – which has not been raised in his Petition for Writ of Certiorari . . .

is not a correct representation of the record.

Petitioner at all times herein of concern has and does challenge the decisions, in total, of the courts below, including that of the trial court, as contrary to the law and to the Constitutions of the State of California and the United States, all in violation of Petitioner's right to due process, equal protection, and fair treatment, hence,

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there is no doubt that this matter, coming out of lowly State Family Law court proceedings indeed presents serious questions of rights specifically set up and claimed by and under the Constitution(s).

Respondent, in this latter regard, in its Brief in Opposition, trivializes the proceedings below as a Family Law matter, saying Petitioner cites not such cases in support of his position. And, there are no Family Law cases ***per se*** in this genre of the law. But, that circumstance does not trivialize this proceeding, and, instead, it magnifies the importance of this pending matter in that the majority of Americans who experience litigation is involved in Family Law court, these courts do not follow the usual rules of civil procedure, and they have no jury proceedings. As a result, it is of paramount importance to all Americans that these same courts conduct the legal process under the Constitution(s) and consistent with statutory law, and, in so doing, do not violate any party's right to due process, equal protection, and fair and impartial treatment under the law.

ARGUMENT

The most egregious error made by the doubting Respondent is presented on Page 11, Lines 3 – 13, wherein it is stated as follows:

> This is a gross misreading of the Court of Appeal Opinion. The Opinion simply affirms the sanctions imposed by the trial court for Petitioner's egregious evasion of his duty to respond forthrightly to Respondent's discovery after being ordered to sit for his deposition.

> The trial court did not "impose any discovery sanctions (it) want(ed to)" – it only imposed the sanctions authorized by California Code of Civil Procedure sections 2023.30 and 2025.450 for the offending conduct described in these statutes.

This assertion is erroneous on multiple levels, including (1) the trial court did not impose sanctions authorized by law, and, instead, made orders in the guise of sanctions contrary to law and (2) nothing in either of the cited code sections, or any of the relevant California law, in any way authorize what the trial court did in this matter, which was to deprive the Petitioner of all of his interest in all of the property of concern, be it community or separate in nature, and (3) in so doing the aforesaid, the trial court did indeed violate Petitioner's right to due process, equal protection, and fair treatment under the law.

The Respondent, at Page 3, on Line 5, makes reference to the "Report and Order," alluding to the Report and Order premised upon the Report, Findings, and Recommendation of Referee Retired Judge Martha Goldin, of record herein.

The Report and Order is not in dispute, and it identifies various properties of the parties below, and, further, classifies one and all of them as community property of the Petitioner and Respondent. And, the trial court, thereupon, awarded all of the aforesaid community property to the Respondent. In making its decision, the trial court relied upon the aforesaid code sections.

Yet, neither section 2023.30 or 2025.450 give authority to the court to essentially forfeit Petitioner's community property. True, the trial court could error and find separate property to be community, and such would be subject to appeal, however nothing in any of the laws of the State of California authorize the trial court to confiscate Petitioner's interest in property the court has found to be community in nature.

Likewise, whatever the trial court did was required to be consistent not only with the law but also with the pleadings of the parties, all of record herein. And, in this regard, the Respondent's pleadings below prayed for only what she was entitled to under the applicable Family Law, to wit: no more than one (1/2) half of the identified community property assets of the parties. Respondent at no point in the proceedings ever requested more, other, or further than what was and is authorized and provided for by law.

Hence, the trial court's decision to deprive the Petitioner of everything, and to award to the Respondent all of the identified community property assets of the parties, was and is contrary to the applicable laws of the State of California, was and is beyond the authority of the trial court, and was and is inconsistent with the Constitution of the State of California and the United States.

The end result of all of this, very clearly, was and is the violation of the Petitioner's right to life, liberty, and property under the Constitutions of the State of California and the United States, and, in this regard, his right to due process, equal protection, and fair treatment have been violated.

REASONS TO GRANT THE PETITION

Where there has been a violation of Petitioner's right to due process, equal protection, and fair treatment under the law and the Constitution, the petition of concern should be granted. The law abhors forfeitures, and, in point of fact, pursuant to the above, the confiscation of private property sustained by the Petitioner under the trial court's erroneous decision was and is contrary the law and the Constitution.

Respondent in its Brief in Opposition, at Page 8, Lines 16 – 20, represents that Rule 37 of the Federal Rules of Civil Procedure mirror the sort of sanctions authorized by section 2023.30 or 2025.450. This is for the most part true, but the assertion is irrelevant to the instance case.

Specifically, there is no divorce or Family Law litigation at the Federal level, hence Rule 37 has never found application in any such Family Law case. And, even if it were so applied, Rule 37 in no way would otherwise authorize or permit the sort of trial court decision that is the subject of this proceeding.

Respondent, in the above regard, goes on to state that Rule 37 empowers the trial court to prohibit a disobedient litigant from even introducing evidence as to certain designated claims. This too is true, but, again, it is of no import in the pending matter.

In this case, as now before the court, even if the trial court prohibited the disobedient litigant from introducing evidence as to certain designated claims,

then, the Respondent would thereby be entitled to prevail on those claims, per the pleadings, and, in this case, the pleadings were and are unambiguous, to wit: the Respondent asserted a community, being fifty (50%) percent interest, in the claimed property, and, even in a situation of default, voluntary or imposed, the Respondent was and is entitled to said fifty (50%) percent interest, not more, not under the pleadings, not under any definition of the "Res" in controversy, not under any applicable law or statute, and, certainly, not under section 2023.30 or 2025.450, and not under either the Constitution of the State of California or the United States.

And, at Page 10 of Respondent's Brief in Opposition, at Lines 12 – 14, it is stated as follows:

> From these existing federal cases, it is clear that the California Court of Appeals decision is not in conflict with the decisions of the federal judiciary.

Yet, this statement is vacuous, specifically because *Insurance Corp of Ireland, Ltd. v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492, *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, and *Roadway Express, Inc. v. U.S. Department of Labor, Administrative Review Board*, 495 F.3d 477 (2007) are substantially distinct from the instance proceedings and are distinguishable.

In all of the cases cited, there was the whole of property in dispute by and between the parties whereby each party claimed from the outset all of the "Res" in controversy, hence, most assuredly, the courts below in those matters had both legal and procedure authority to award the property, upon proper findings and or pursuant to any applicable law, and or in the case of a default (voluntary or otherwise) the entire property to either one or the other of the parties. These were and are civil cases.

The instance proceedings, as Respondent has pointed out, are Family Law proceedings, and these same Family Law proceedings are governed by civil Family Law statutes and rules, including rules of pleading and practice.

As already mentioned in the above, by and under the Constitution, the applicable Family Law statutes and rules, as well as the relevant rules of pleading and practice, and the pleadings of record herein, the identified community property, the "Res" ***per se*** in this matter has never been "up for grabs" by either or both parties, and, in point of fact, at most, as to either or both parties, only fifty (50%) percent thereof has ever been "in play" or otherwise subject to order and award by the trial court.

There is nothing in any of the cited cases, the law of the State of California, the rules of pleading and practice of that State, the Federal law, the Federal rules of pleading and practice, the Constitution of California, or the Constitution of the United States to permit the trial court to take property of and from the Petitioner and

award it to the Respondent, and, in so doing, give to her more than the law allows, even more than she has prayed for in the pleadings. And, to so do, under the guise of discovery sanctions has no support in fact or law, and goes above and beyond the statutory and Constitutional authority of the court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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